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OFFICIAL REPORTS

OF

THE SUPREME COURT

June 9 Through June 20, 2016

CHRISTINE LUCHOK FALLON
REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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CLARENCE THOMAS, Associate Justice.
RUTH BADER GINSBURG, Associate Justice.
STEPHEN BREYER, Associate Justice.
SAMUEL A. ALITO, Jr., Associate Justice.
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SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective February 25, 2016, viz.:

For the District of Columbia Circuit, John G. Roberts, Jr., Chief Justice.

For the First Circuit, Stephen Breyer, Associate Justice.

For the Second Circuit, Ruth Bader Ginsburg, Associate Justice.

For the Third Circuit, Samuel A. Alito, Jr., Associate Justice.

For the Fourth Circuit, John G. Roberts, Jr., Chief Justice.

For the Fifth Circuit, Clarence Thomas, Associate Justice.

For the Sixth Circuit, Elena Kagan, Associate Justice.

For the Seventh Circuit, Elena Kagan, Associate Justice.

For the Eighth Circuit, Samuel A. Alito, Jr., Associate Justice.

For the Ninth Circuit, Anthony M. Kennedy, Associate Justice.

For the Tenth Circuit, Sonia Sotomayor, Associate Justice.

For the Eleventh Circuit, Clarence Thomas, Associate Justice.

For the Federal Circuit, John G. Roberts, Jr., Chief Justice.

February 25, 2016.

(For next previous allotment, see 577 U. S., Pt. 2, p. ii.)

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TABLE OF CASES REPORTED

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Cases reported before page 901 are those decided with opinions of the Court. Cases reported on page 901 *et seq.* are those in which orders were entered. The page numbers are the same as they will be in the bound volume, thus making the *permanent* citations available upon publication of this preliminary print.

An individual attorney whose name appears on a brief filed with the Court will be listed in the United States Reports in connection with the opinion in the case concerning which the document is filed if he or she is a member of the Court's Bar at the time the case is argued.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2015

WILLIAMS *v.* PENNSYLVANIA

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

No. 15–5040. Argued February 29, 2016—Decided June 9, 2016

Petitioner Williams was convicted of the 1984 murder of Amos Norwood and sentenced to death. During the trial, the then-district attorney of Philadelphia, Ronald Castille, approved the trial prosecutor's request to seek the death penalty against Williams. Over the next 26 years, Williams's conviction and sentence were upheld on direct appeal, state postconviction review, and federal habeas review. In 2012, Williams filed a successive petition pursuant to Pennsylvania's Post Conviction Relief Act (PCRA), arguing that the prosecutor had obtained false testimony from his codefendant and suppressed material, exculpatory evidence in violation of *Brady* v. *Maryland*, 373 U. S. 83. Finding that the trial prosecutor had committed *Brady* violations, the PCRA court stayed Williams's execution and ordered a new sentencing hearing. The Commonwealth asked the Pennsylvania Supreme Court, whose chief justice was former District Attorney Castille, to vacate the stay. Williams filed a response, along with a motion asking Chief Justice Castille to recuse himself or, if he declined to do so, to refer the motion to the full court for decision. Without explanation, the chief justice denied Williams's motion for recusal and the request for its referral. He then joined the State Supreme Court opinion vacating the PCRA court's grant of penalty-phase relief and reinstating Williams's death sentence. Two weeks later, Chief Justice Castille retired from the bench.

Syllabus

Held:

1. Chief Justice Castille's denial of the recusal motion and his subsequent judicial participation violated the Due Process Clause of the Fourteenth Amendment. Pp. 8–14.

(a) The Court's due process precedents do not set forth a specific test governing recusal when a judge had prior involvement in a case as a prosecutor; but the principles on which these precedents rest dictate the rule that must control in the circumstances here: Under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case. The Court applies an objective standard that requires recusal when the likelihood of bias on the part of the judge "is too high to be constitutionally tolerable." *Caperton* v. *A. T. Massey Coal Co.*, 556 U. S. 868, 872. A constitutionally intolerable probability of bias exists when the same person serves as both accuser and adjudicator in a case. See *In re Murchison*, 349 U. S. 133, 136–137. No attorney is more integral to the accusatory process than a prosecutor who participates in a major adversary decision. As a result, a serious question arises as to whether a judge who has served as an advocate for the State in the very case the court is now asked to adjudicate would be influenced by an improper, if inadvertent, motive to validate and preserve the result obtained through the adversary process. In these circumstances, neither the involvement of multiple actors in the case nor the passage of time relieves the former prosecutor of the duty to withdraw in order to ensure the neutrality of the judicial process in determining the consequences his or her own earlier, critical decision may have set in motion. Pp. 8–11.

(b) Because Chief Justice Castille's authorization to seek the death penalty against Williams amounts to significant, personal involvement in a critical trial decision, his failure to recuse from Williams's case presented an unconstitutional risk of bias. The decision to pursue the death penalty is a critical choice in the adversary process, and Chief Justice Castille had a significant role in this decision. Without his express authorization, the Commonwealth would not have been able to pursue a death sentence against Williams. Given the importance of this decision and the profound consequences it carries, a responsible prosecutor would deem it to be a most significant exercise of his or her official discretion. The fact that many jurisdictions, including Pennsylvania, have statutes and professional codes of conduct that already require recusal under the circumstances of this case suggests that today's decision will not occasion a significant change in recusal practice. Pp. 11–14.

2. An unconstitutional failure to recuse constitutes structural error that is "not amenable" to harmless-error review, regardless of whether

the judge's vote was dispositive, *Puckett* v. *United States*, 556 U. S. 129, 141. Because an appellate panel's deliberations are generally confidential, it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decisionmaking process. Indeed, one purpose of judicial confidentiality is to ensure that jurists can reexamine old ideas and suggest new ones, while both seeking to persuade and being open to persuasion by their colleagues. It does not matter whether the disqualified judge's vote was necessary to the disposition of the case. The fact that the interested judge's vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position—an outcome that does not lessen the unfairness to the affected party. A multimember court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part. Because Chief Justice Castille's participation in Williams's case was an error that affected the State Supreme Court's whole adjudicatory framework below, Williams must be granted an opportunity to present his claims to a court unburdened by any "possible temptation . . . not to hold the balance nice, clear and true between the State and the accused," *Tumey* v. *Ohio*, 273 U. S. 510, 532. Pp. 14–17.

629 Pa. 533, 105 A. 3d 1234, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which ALITO, J., joined, *post*, p. 17. THOMAS, J., filed a dissenting opinion, *post*, p. 24.

Stuart B. Lev argued the cause for petitioner. With him on the briefs were *Leigh M. Skipper*, *Shawn Nolan*, *Matthew C. Lawry*, and *Timothy P. Kane*.

Ronald Eisenberg argued the cause for respondent. With him on the brief were *Hugh J. Burns, Jr.*, and *R. Seth Williams.**

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*Briefs of *amici curiae* urging reversal were filed for the American Academy of Appellate Lawyers by *Wendy Cole Lascher* and *Charles A. Bird*; for the American Bar Association by *Paulette Brown*; for the American Civil Liberties Union et al. by *Anna Arceneaux*, *Cassandra Stubbs*, *Steven R. Shapiro*, *Mary Catherine Roper*, and *Witold J. Walczak*; for Former Appellate Court Jurists by *Jeffrey T. Green*, *David E. Kronen-*

JUSTICE KENNEDY delivered the opinion of the Court.

In this case, the Supreme Court of Pennsylvania vacated the decision of a postconviction court, which had granted relief to a prisoner convicted of first-degree murder and sentenced to death. One of the justices on the State Supreme Court had been the district attorney who gave his official approval to seek the death penalty in the prisoner's case. The justice in question denied the prisoner's motion for recusal and participated in the decision to deny relief. The question presented is whether the justice's denial of the recusal motion and his subsequent judicial participation violated the Due Process Clause of the Fourteenth Amendment.

This Court's precedents set forth an objective standard that requires recusal when the likelihood of bias on the part of the judge " 'is too high to be constitutionally tolerable.' " *Caperton* v. *A. T. Massey Coal Co.*, 556 U. S. 868, 872 (2009) (quoting *Withrow* v. *Larkin*, 421 U. S. 35, 47 (1975)). Applying this standard, the Court concludes that due process compelled the justice's recusal.

I

Petitioner is Terrance Williams. In 1984, soon after Williams turned 18, he murdered 56-year-old Amos Norwood in Philadelphia. At trial, the Commonwealth presented evidence that Williams and a friend, Marc Draper, had been standing on a street corner when Norwood drove by. Williams and Draper requested a ride home from Norwood, who agreed. Draper then gave Norwood false directions that led him to drive toward a cemetery. Williams and Draper ordered Norwood out of the car and into the cemetery. There,

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berg, and *Virginia E. Sloan*; for the Constitutional Accountability Center by *Elizabeth B. Wydra* and *Brianne J. Gorod*; and for Former Judges with Prosecutorial Experience by *Alan P. Solow*.

Briefs of *amici curiae* were filed for the Brennan Center for Justice at NYU School of Law et al. by *Daniel F. Kolb*, *David B. Toscano*, and *Matthew Menendez*; and for the Ethics Bureau at Yale et al. by *Lawrence J. Fox*.

the two men tied Norwood in his own clothes and beat him to death. Testifying for the Commonwealth, Draper suggested that robbery was the motive for the crime. Williams took the stand in his own defense, stating that he was not involved in the crime and did not know the victim.

During the trial, the prosecutor requested permission from her supervisors in the district attorney's office to seek the death penalty against Williams. To support the request, she prepared a memorandum setting forth the details of the crime, information supporting two statutory aggravating factors, and facts in mitigation. After reviewing the memorandum, the then-district attorney of Philadelphia, Ronald Castille, wrote this note at the bottom of the document: "Approved to proceed on the death penalty." App. 426a.

During the penalty phase of the trial, the prosecutor argued that Williams deserved a death sentence because he killed Norwood "'for no other reason but that a kind man offered him a ride home.'" Brief for Petitioner 7. The jurors found two aggravating circumstances: that the murder was committed during the course of a robbery and that Williams had a significant history of violent felony convictions. That criminal history included a previous conviction for a murder he had committed at age 17. The jury found no mitigating circumstances and sentenced Williams to death. Over a period of 26 years, Williams's conviction and sentence were upheld on direct appeal, state postconviction review, and federal habeas review.

In 2012, Williams filed a successive petition pursuant to Pennsylvania's Post Conviction Relief Act (PCRA), 42 Pa. Cons. Stat. § 9541 *et seq.* (2007). The petition was based on new information from Draper, who until then had refused to speak with Williams's attorneys. Draper told Williams's counsel that he had informed the Commonwealth before trial that Williams had been in a sexual relationship with Norwood and that the relationship was the real motive for Norwood's murder. According to Draper, the Commonwealth had instructed him to give false testimony that Williams killed Norwood to rob him. Draper also admitted he had received an undisclosed benefit in exchange for his testimony: The trial prosecutor had promised to write a letter to the state parole board on his behalf. At trial, the prosecutor had elicited testimony from Draper indicating that his only agreement with the prosecution was to plead guilty in exchange for truthful testimony. No mention was made of the additional promise to write the parole board.

The Philadelphia Court of Common Pleas, identified in the proceedings below as the PCRA court, held an evidentiary hearing on Williams's claims. Williams alleged in his petition that the prosecutor had procured false testimony from Draper and suppressed evidence regarding Norwood's sexual relationship with Williams. At the hearing, both Draper and the trial prosecutor testified regarding these allegations. The PCRA court ordered the district attorney's office to produce the previously undisclosed files of the prosecutor and police. These documents included the trial prosecutor's sentencing memorandum, bearing then-District Attorney Castille's authorization to pursue the death penalty. Based on the Commonwealth's files and the evidentiary hearing, the PCRA court found that the trial prosecutor had suppressed material, exculpatory evidence in violation of *Brady* v. *Maryland*, 373 U. S. 83 (1963), and engaged in "prosecutorial gamesmanship." App. 168a. The court stayed Williams's execution and ordered a new sentencing hearing.

Seeking to vacate the stay of execution, the Commonwealth submitted an emergency application to the Pennsylvania Supreme Court. By this time, almost three decades had passed since Williams's prosecution. Castille had been elected to a seat on the State Supreme Court and was serving as its chief justice. Williams filed a response to the Commonwealth's application. The disclosure of the trial prosecutor's sentencing memorandum in the PCRA proceedings had alerted Williams to Chief Justice Castille's involvement in the decision to seek a death sentence in his case.

For this reason, Williams also filed a motion asking Chief Justice Castille to recuse himself or, if he declined to do so, to refer the recusal motion to the full court for decision. The Commonwealth opposed Williams's recusal motion. Without explanation, Chief Justice Castille denied the motion for recusal and the request for its referral. Two days later, the Pennsylvania Supreme Court denied the application to vacate the stay and ordered full briefing on the issues raised in the appeal. The State Supreme Court then vacated the PCRA court's order granting penalty-phase relief and reinstated Williams's death sentence. Chief Justice Castille and Justices Baer and Stevens joined the majority opinion written by Justice Eakin. Justices Saylor and Todd concurred in the result without issuing a separate opinion. See 629 Pa. 533, 551, 105 A. 3d 1234, 1245 (2014).

Chief Justice Castille authored a concurrence. He lamented that the PCRA court had "lost sight of its role as a neutral judicial officer" and had stayed Williams's execution "for no valid reason." *Id.*, at 552, 105 A. 3d, at 1245. "[B]efore condemning officers of the court," the chief justice stated, "the tribunal should be aware of the substantive status of *Brady* law," which he believed the PCRA court had misapplied. *Ibid.*, 105 A. 3d, at 1246. In addition, Chief Justice Castille denounced what he perceived as the "obstructionist anti-death penalty agenda" of Williams's attorneys from the Federal Community Defender Office. *Id.*, at 553, 105 A. 3d, at 1246. PCRA courts "throughout Pennsylvania need to be vigilant and circumspect when it comes to the activities of this particular advocacy group," he wrote, lest Defender Office lawyers turn postconviction proceedings "into a circus where [they] are the ringmasters, with their parrots and puppets as a sideshow." *Id.*, at 554, 105 A. 3d, at 1247.

Two weeks after the Pennsylvania Supreme Court decided Williams's case, Chief Justice Castille retired from the bench. This Court granted Williams's petition for certiorari. 576 U. S. 1095 (2015).

II

A

Williams contends that Chief Justice Castille's decision as district attorney to seek a death sentence against him barred the chief justice from later adjudicating Williams's petition to overturn that sentence. Chief Justice Castille, Williams argues, violated the Due Process Clause of the Fourteenth Amendment by acting as both accuser and judge in his case.

The Court's due process precedents do not set forth a specific test governing recusal when, as here, a judge had prior involvement in a case as a prosecutor. For the reasons explained below, however, the principles on which these precedents rest dictate the rule that must control in the circumstances here. The Court now holds that under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case.

Due process guarantees "an absence of actual bias" on the part of a judge. *In re Murchison*, 349 U. S. 133, 136 (1955). Bias is easy to attribute to others and difficult to discern in oneself. To establish an enforceable and workable framework, the Court's precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present. The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, "the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton*, 556 U. S., at 881. Of particular relevance to the instant case, the Court has determined that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case. See *Murchison*, 349 U. S., at 136–137. This objective risk of bias is reflected in the due process maxim that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *Id.*, at 136.

The due process guarantee that "no man can be a judge in his own case" would have little substance if it did not disqualify a former prosecutor from sitting in judgment of a prosecution in which he or she had made a critical decision. This conclusion follows from the Court's analysis in *In re Murchison*. That case involved a "one-man judge-grand jury" proceeding, conducted pursuant to state law, in which the judge called witnesses to testify about suspected crimes. *Id.*, at 134. During the course of the examinations, the judge became convinced that two witnesses were obstructing the proceeding. He charged one witness with perjury and then, a few weeks later, tried and convicted him in open court. The judge charged the other witness with contempt and, a few days later, tried and convicted him as well. This Court overturned the convictions on the ground that the judge's dual position as accuser and decisionmaker in the contempt trials violated due process: "Having been a part of [the accusatory] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused." *Id.*, at 137.

No attorney is more integral to the accusatory process than a prosecutor who participates in a major adversary decision. When a judge has served as an advocate for the State in the very case the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome. There is, furthermore, a risk that the judge "would be so psychologically wedded" to his or her previous position as a prosecutor that the judge "would consciously or unconsciously avoid the appearance of having erred or changed position." *Withrow*, 421 U. S., at 57. In addition, the judge's "own personal knowledge and impression" of the case, acquired through his or her role in the prosecution, may carry far more weight with the judge than the parties' arguments to the court. *Murchison*, *supra*, at 138; see also *Caperton*, *supra*, at 881.

Pennsylvania argues that *Murchison* does not lead to the rule that due process requires disqualification of a judge who, in an earlier role as a prosecutor, had significant involvement in making a critical decision in the case. The facts of *Murchison*, it should be acknowledged, differ in many respects from a case like this one. In *Murchison*, over the course of several weeks, a single official (the so-called judge-grand jury) conducted an investigation into suspected crimes; made the decision to charge witnesses for obstruction of that investigation; heard evidence on the charges he had lodged; issued judgments of conviction; and imposed sentence. See 349 U. S., at 135 (petitioners objected to "trial before the judge who was at the same time the complainant, indicter and prosecutor"). By contrast, a judge who had an earlier involvement in a prosecution might have been just one of several prosecutors working on the case at each stage of the proceedings; the prosecutor's immediate role might have been limited to a particular aspect of the prosecution; and decades might have passed before the former prosecutor, now a judge, is called upon to adjudicate a claim in the case.

These factual differences notwithstanding, the constitutional principles explained in *Murchison* are fully applicable where a judge had a direct, personal role in the defendant's prosecution. The involvement of other actors and the passage of time are consequences of a complex criminal justice system, in which a single case may be litigated through multiple proceedings taking place over a period of years. This context only heightens the need for objective rules preventing the operation of bias that otherwise might be obscured. Within a large, impersonal system, an individual prosecutor might still have an influence that, while not so visible as the one-man grand jury in *Murchison*, is nevertheless significant. A prosecutor may bear responsibility for any number of critical decisions, including what charges to bring, whether to extend a plea bargain, and which witnesses to call. Even if decades intervene before the former prosecutor revisits the matter as a jurist, the case may implicate the effects and continuing force of his or her original decision. In these circumstances, there remains a serious risk that a judge would be influenced by an improper, if inadvertent, motive to validate and preserve the result obtained through the adversary process. The involvement of multiple actors and the passage of time do not relieve the former prosecutor of the duty to withdraw in order to ensure the neutrality of the judicial process in determining the consequences that his or her own earlier, critical decision may have set in motion.

B

This leads to the question whether Chief Justice Castille's authorization to seek the death penalty against Williams amounts to significant, personal involvement in a critical trial decision. The Court now concludes that it was a significant, personal involvement; and, as a result, Chief Justice Castille's failure to recuse from Williams's case presented an unconstitutional risk of bias.

As an initial matter, there can be no doubt that the decision to pursue the death penalty is a critical choice in the adversary process. Indeed, after a defendant is charged with a death-eligible crime, whether to ask a jury to end the defendant's life is one of the most serious discretionary decisions a prosecutor can be called upon to make.

Nor is there any doubt that Chief Justice Castille had a significant role in this decision. Without his express authorization, the Commonwealth would not have been able to pursue a death sentence against Williams. The importance of this decision and the profound consequences it carries make it evident that a responsible prosecutor would deem it to be a most significant exercise of his or her official discretion and professional judgment.

Pennsylvania nonetheless contends that Chief Justice Castille in fact did not have significant involvement in the decision to seek a death sentence against Williams. The chief justice, the Commonwealth points out, was the head of a large district attorney's office in a city that saw many capital murder trials. Tr. of Oral Arg. 36. According to Pennsylvania, his approval of the trial prosecutor's request to pursue capital punishment in Williams's case amounted to a brief administrative act limited to "the time it takes to read a one-and-a-half-page memo." *Ibid.* In this Court's view, that characterization cannot be credited. The Court will not assume that then-District Attorney Castille treated so major a decision as a perfunctory task requiring little time, judgment, or reflection on his part.

Chief Justice Castille's own comments while running for judicial office refute the Commonwealth's claim that he played a mere ministerial role in capital sentencing decisions. During the chief justice's election campaign, multiple news outlets reported his statement that he "sent 45 people to death rows" as district attorney. Seelye, Castille Keeps His Cool in Court Run, Philadelphia Inquirer, Apr. 30, 1993, p. B1; see also, *e. g.*, Brennan, State Voters Must Choose Next Supreme Court Member, Legal Intelligencer, Oct. 28, 1993, pp. 1, 12. Chief Justice Castille's willingness to take personal responsibility for the death sentences obtained during his tenure as district attorney indicate that, in his own view, he played a meaningful role in those sentencing decisions and considered his involvement to be an important duty of his office.

Although not necessary to the disposition of this case, the PCRA court's ruling underscores the risk of permitting a former prosecutor to be a judge in what had been his or her own case. The PCRA court determined that the trial prosecutor—Chief Justice Castille's former subordinate in the district attorney's office—had engaged in multiple, intentional *Brady* violations during Williams's prosecution. App.

131–145, 150–154. While there is no indication that Chief Justice Castille was aware of the alleged prosecutorial misconduct, it would be difficult for a judge in his position not to view the PCRA court's findings as a criticism of his former office and, to some extent, of his own leadership and supervision as district attorney.

The potential conflict of interest posed by the PCRA court's findings illustrates the utility of statutes and professional codes of conduct that "provide more protection than due process requires." *Caperton*, 556 U. S., at 890. It is important to note that due process "demarks only the outer boundaries of judicial disqualifications." *Aetna Life Ins. Co.* v. *Lavoie*, 475 U. S. 813, 828 (1986). Most questions of recusal are addressed by more stringent and detailed ethical rules, which in many jurisdictions already require disqualification under the circumstances of this case. See Brief for American Bar Association as *Amicus Curiae* 5, 11–14; see also ABA Model Code of Judicial Conduct Rules 2.11(A)(1), (A)(6)(b) (2011) (no judge may participate "in any proceeding in which the judge's impartiality might reasonably be questioned," including where the judge "served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding"); ABA Center for Professional Responsibility Policy Implementation Comm., Comparison of ABA Model Judicial Code and State Variations (Dec. 14, 2015), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2_11.authcheckdam.pdf (as last visited June 7, 2016) (28 States have adopted language similar to ABA Model Judicial Code Rule 2.11); 28 U. S. C. § 455(b)(3) (recusal required where judge "has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding"). At the time Williams filed his recusal motion with the Pennsylvania Supreme Court, for example, Pennsylvania's Code of Judicial Conduct disqualified judges from any proceeding in which "they served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter . . . ." Pa. Code of Judicial Conduct, Canon 3C (1974, as amended). The fact that most jurisdictions have these rules in place suggests that today's decision will not occasion a significant change in recusal practice.

Chief Justice Castille's significant, personal involvement in a critical decision in Williams's case gave rise to an unacceptable risk of actual bias. This risk so endangered the appearance of neutrality that his participation in the case "must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow*, 421 U. S., at 47.

III

Having determined that Chief Justice Castille's participation violated due process, the Court must resolve whether Williams is entitled to relief. In past cases, the Court has not had to decide the question whether a due process violation arising from a jurist's failure to recuse amounts to harmless error if the jurist is on a multimember court and the jurist's vote was not decisive. See *Lavoie*, *supra*, at 827–828 (addressing "the question whether a decision of a multimember tribunal must be vacated because of the participation of one member who had an interest in the outcome of the case," where that member's vote was outcome determinative). For the reasons discussed below, the Court holds that an unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote.

The Court has little trouble concluding that a due process violation arising from the participation of an interested judge is a defect "not amenable" to harmless-error review, regardless of whether the judge's vote was dispositive. *Puckett* v. *United States*, 556 U. S. 129, 141 (2009) (emphasis deleted). The deliberations of an appellate panel, as a general rule, are confidential. As a result, it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decisionmaking process. Indeed, one purpose of judicial confidentiality is to assure jurists that they can reexamine old ideas and suggest new ones, while both seeking to persuade and being open to persuasion by their colleagues. As Justice Brennan wrote in his *Lavoie* concurrence:

> "The description of an opinion as being 'for the court' connotes more than merely that the opinion has been joined by a majority of the participating judges. It reflects the fact that these judges have exchanged ideas and arguments in deciding the case. It reflects the collective process of deliberation which shapes the court's perceptions of which issues must be addressed and, more importantly, how they must be addressed. And, while the influence of any single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition." 475 U. S., at 831.

These considerations illustrate, moreover, that it does not matter whether the disqualified judge's vote was necessary to the disposition of the case. The fact that the interested judge's vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position. That outcome does not lessen the unfairness to the affected party. See *id.*, at 831–832 (Blackmun, J., concurring in judgment).

A multimember court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part. An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself. When the objective risk of actual bias on the part of a judge rises to an unconstitutional level, the failure to recuse cannot be deemed harmless.

The Commonwealth points out that ordering a rehearing before the Pennsylvania Supreme Court may not provide complete relief to Williams because judges who were exposed to a disqualified judge may still be influenced by their colleague's views when they rehear the case. Brief for Respondent 51, 62. An inability to guarantee complete relief for a constitutional violation, however, does not justify withholding a remedy altogether. Allowing an appellate panel to reconsider a case without the participation of the interested member will permit judges to probe lines of analysis or engage in discussions they may have felt constrained to avoid in their first deliberations.

Chief Justice Castille's participation in Williams's case was an error that affected the State Supreme Court's whole adjudicatory framework below. Williams must be granted an opportunity to present his claims to a court unburdened by any "possible temptation . . . not to hold the balance nice, clear and true between the State and the accused." *Tumey* v. *Ohio*, 273 U. S. 510, 532 (1927).

* * *

Where a judge has had an earlier significant, personal involvement as a prosecutor in a critical decision in the defendant's case, the risk of actual bias in the judicial proceeding rises to an unconstitutional level. Due process entitles Terrance Williams to "a proceeding in which he may present his case with assurance" that no member of the court is "predisposed to find against him." *Marshall* v. *Jerrico, Inc.*, 446 U. S. 238, 242 (1980).

The judgment of the Supreme Court of Pennsylvania is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

CHIEF JUSTICE ROBERTS, with whom JUSTICE ALITO joins, dissenting.

In 1986, Ronald Castille, then District Attorney of Philadelphia, authorized a prosecutor in his office to seek the death penalty against Terrance Williams. Almost 30 years later, as Chief Justice of the Pennsylvania Supreme Court, he participated in deciding whether Williams's fifth habeas petition—which raised a claim unconnected to the prosecution's decision to seek the death penalty—could be heard on the merits or was instead untimely. This Court now holds that because Chief Justice Castille made a "critical" decision as a prosecutor in Williams's case, there is a risk that he "would be so psychologically wedded" to his previous decision that it would violate the Due Process Clause for him to decide the distinct issues raised in the habeas petition. *Ante*, at 9 (internal quotation marks omitted). According to the Court, that conclusion follows from the maxim that "no man can be a judge in his own case." *Ibid.* (internal quotation marks omitted).

The majority opinion rests on proverb rather than precedent. This Court has held that there is "a presumption of honesty and integrity in those serving as adjudicators." *Withrow* v. *Larkin*, 421 U. S. 35, 47 (1975). To overcome that presumption, the majority relies on *In re Murchison*, 349 U. S. 133 (1955). We concluded there that the Due Process Clause is violated when a judge adjudicates the same question—based on the same facts—that he had already considered as a grand juror in the same case. Here, however, Williams does not allege that Chief Justice Castille had *any* previous knowledge of the contested facts at issue in the habeas petition, or that he had previously made *any* decision on the questions raised by that petition. I would accordingly hold that the Due Process Clause did not require Chief Justice Castille's recusal.

I

In 1986, petitioner Terrance Williams stood trial for the murder of Amos Norwood. Prosecutors believed that Williams and his friend Marc Draper had asked Norwood for a ride, directed him to a cemetery, and then beat him to death with a tire iron after robbing him. Andrea Foulkes, the Philadelphia Assistant District Attorney prosecuting the case, prepared a one-and-a-half page memo for her superiors—Homicide Unit Chief Mark Gottlieb and District Attorney Ronald Castille—"request[ing] that we actively seek the death penalty." App. 424a. The memo briefly described the facts of the case and Williams's prior felonies, including a previous murder conviction. Gottlieb read the memo and then passed it to Castille with a note recommending the death penalty. *Id.*, at 426a. Castille wrote at the bottom of the memo, "Approved to proceed on the death penalty," and signed his name. *Ibid.*

At trial, Williams testified that he had never met Norwood and that someone else must have murdered him. After hearing extensive evidence linking Williams to the crime, the jury convicted him of murder and sentenced him to death. 524 Pa. 218, 227, 570 A. 2d 75, 79–80 (1990).

In 1995, Williams filed a habeas petition in Pennsylvania state court, alleging that his trial counsel had been ineffective for failing to present mitigating evidence of his childhood sexual abuse, among other claims. At a hearing related to that petition, Williams acknowledged that he knew Norwood and claimed that Norwood had sexually abused him. 629 Pa. 533, 543, 105 A. 3d 1234, 1240 (2014). The petition was denied. Williams filed two more state habeas petitions, which were both dismissed as untimely, and a federal habeas petition, which was also denied. See *Williams* v. *Beard*, 637 F. 3d 195, 238 (CA3 2011).

This case arises out of Williams's fifth habeas petition, which he filed in state court in 2012. In that petition, Williams argued that he was entitled to a new sentencing proceeding because the prosecution at trial had failed to turn over certain evidence suggesting that "Norwood was sexually involved with boys around [Williams's] age at the time of his murder." Crim. No. CP–51–CR–0823621–1984 (Phila. Ct. Common Pleas, Nov. 27, 2012), App. 80a.

It is undisputed that Williams's fifth habeas petition is untimely under Pennsylvania law. In order to overcome that time bar, Pennsylvania law required Williams to show that "(1) the failure to previously raise [his] claim was the result of interference by government officials and (2) the information on which he relies could not have been obtained earlier with the exercise of due diligence." 629 Pa., at 542, 105 A. 3d, at 1240. The state habeas court held that Williams met that burden because "the government withheld multiple statements from [Williams's] trial counsel, all of which strengthened the inference that Amos Norwood was sexually inappropriate with a number of teenage boys," and Williams was unable to access those statements until an evidentiary proceeding ordered by the court. App. 95a.

The Commonwealth appealed to the Pennsylvania Supreme Court, and Williams filed a motion requesting that Chief Justice Castille recuse himself on the ground that he had "personally authorized his Office to seek the death penalty" nearly 30 years earlier. *Id.*, at 181a (emphasis deleted). Chief Justice Castille summarily denied the recusal motion, and the six-member Pennsylvania Supreme Court proceeded to hear the case. The court unanimously reinstated Williams's sentence.

According to the Pennsylvania Supreme Court, Williams failed to make the threshold showing necessary to overcome the time bar because there was "abundant evidence" that

Williams "knew of Norwood's homosexuality and conduct with teenage boys well before trial, sufficient to present [Norwood] as unsympathetic before the jury." 629 Pa., at 545, 105 A. 3d, at 1241. The court pointed out that Williams was, of course, personally aware of Norwood's abuse and could have raised the issue at trial, but instead chose to disclaim having ever met Norwood. The court also noted that Williams had raised similar claims of abuse in his first state habeas proceeding. *Ibid.* Chief Justice Castille concurred separately, criticizing the lower court for failing to dismiss Williams's petition as "time-barred and frivolous." *Id.*, at 551, 105 A. 3d, at 1245.

II

A

In the context of a criminal proceeding, the Due Process Clause requires States to adopt those practices that are fundamental to principles of liberty and justice, and which inhere "in the very idea of free government" and are "the inalienable right of a citizen of such a government." *Twining* v. *New Jersey*, 211 U. S. 78, 106 (1908). A fair trial and appeal is one such right. See *Lisenba* v. *California*, 314 U. S. 219, 236 (1941); *Aetna Life Ins. Co.* v. *Lavoie*, 475 U. S. 813, 825 (1986). In ensuring that right, "it is normally within the power of the State to regulate procedures under which its laws are carried out," unless a procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.*, at 821 (internal quotation marks omitted).

It is clear that a judge with "a direct, personal, substantial, pecuniary interest" in a case may not preside over that case. *Tumey* v. *Ohio*, 273 U. S. 510, 523 (1927). We have also held that a judge may not oversee a criminal contempt proceeding where the judge has previously served as grand juror in the same case, or where the party charged with contempt has conducted "an insulting attack upon the integrity of the judge carrying such potential for bias as to require disqualification." *Mayberry* v. *Pennsylvania*, 400 U. S. 455, 465–466 (1971) (internal quotation marks omitted); see *Murchison*, 349 U. S., at 139.

Prior to this Court's decision in *Caperton* v. *A. T. Massey Coal Co.*, 556 U. S. 868 (2009), we had declined to require judicial recusal under the Due Process Clause beyond those defined situations. In *Caperton*, however, the Court adopted a new standard that requires recusal "when the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable." *Id.*, at 872 (internal quotation marks omitted). The Court framed the inquiry as "whether, under a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Id.*, at 883–884 (internal quotation marks omitted).

B

According to the majority, the Due Process Clause required Chief Justice Castille's recusal because he had "significant, personal involvement in a critical trial decision" in Williams's case. *Ante*, at 11. Otherwise, the majority explains, there is "an unacceptable risk of actual bias." *Ante*, at 14. In the majority's view, "[t]his conclusion follows from the Court's analysis in *In re Murchison*." *Ante*, at 9. But *Murchison* does not support the majority's new rule—far from it.

Murchison involved a peculiar Michigan law that authorized the same person to sit as both judge and "one-man grand jury" in the same case. 349 U. S., at 133 (internal quotation marks omitted). Pursuant to that law, a Michigan judge—serving as grand jury—heard testimony from two witnesses in a corruption case. The testimony "persuaded" the judge that one of the witnesses "had committed perjury"; the second witness refused to answer questions. *Id.*, at 134–135.

The judge accordingly charged the witnesses with criminal contempt, presided over the trial, and convicted them. *Ibid.* We reversed, holding that the trial had violated the Due Process Clause. *Id.*, at 139.

The Court today, acknowledging that *Murchison* "differ[s] in many respects from a case like this one," *ante*, at 10, earns full marks for understatement. The Court in fact fails to recognize the differences that are critical.

First, *Murchison* found a due process violation because the judge (sitting as grand jury) accused the witnesses of contempt, and then (sitting as judge) presided over their trial on that charge. As a result, the judge had made up his mind about the only issue in the case before the trial had even begun. We held that such prejudgment violated the Due Process Clause. 349 U. S., at 137.

Second, *Murchison* expressed concern that the judge's recollection of the testimony he had heard as grand juror was "likely to weigh far more heavily with him than any testimony given" at trial. *Id.*, at 138. For that reason, the Court found that the judge was at risk of calling "on his own personal knowledge and impression of what had occurred in the grand jury room," rather than the evidence presented to him by the parties. *Ibid.*

Neither of those due process concerns is present here. Chief Justice Castille was involved in the decision to seek the death penalty, and perhaps it would be reasonable under *Murchison* to require him to recuse himself from any challenge casting doubt on that recommendation. But that is not this case.

This case is about whether Williams may overcome the procedural bar on filing an untimely habeas petition, which required him to show that the government interfered with his ability to raise his habeas claim, and that "the information on which he relies could not have been obtained earlier with the exercise of due diligence." 629 Pa., at 542, 105 A. 3d, at 1240. Even if Williams were to overcome the timeliness bar, moreover, the only claim he sought to raise on the merits was that the prosecution had failed to turn over certain evidence at trial. The problem in *Murchison* was that the judge, having been "part of the accusatory process" regarding the guilt or innocence of the defendants, could not then be "wholly disinterested" when called upon to decide that very same issue. 349 U. S., at 137. In this case, in contrast, neither the procedural question nor Williams's merits claim in any way concerns the pretrial decision to seek the death penalty.

It is abundantly clear that, unlike in *Murchison*, Chief Justice Castille had *not* made up his mind about either the contested evidence or the legal issues under review in Williams's fifth habeas petition. How could he have? Neither the contested evidence nor the legal issues were ever before him as prosecutor. The one-and-a-half page memo prepared by Assistant District Attorney Foulkes in 1986 did not discuss the evidence that Williams claims was withheld by the prosecution at trial. It also did not discuss Williams's allegation that Norwood sexually abused young men. It certainly did not discuss whether Williams could have obtained that evidence of abuse earlier through the exercise of due diligence.

Williams does not assert that Chief Justice Castille had any prior knowledge of the alleged failure of the prosecution to turn over such evidence, and he does not argue that Chief Justice Castille had previously made any decision with respect to that evidence in his role as prosecutor. Even assuming that Chief Justice Castille remembered the contents of the memo almost 30 years later—which is doubtful—the memo could not have given Chief Justice Castille any special "impression" of facts or issues not raised in that memo. *Id.*, at 138.

The majority attempts to justify its rule based on the "risk" that a judge "would be so psychologically wedded to his or her previous position as a prosecutor that the judge would consciously or unconsciously avoid the appearance of having erred or changed position." *Ante*, at 9 (internal quotation marks omitted). But as a matter of simple logic, nothing about how Chief Justice Castille might rule on Williams's fifth habeas petition would suggest that the judge had erred or changed his position on the distinct question whether to seek the death penalty prior to trial. In sum, there was not such an "objective risk of actual bias," *ante*, at 16, that it was fundamentally unfair for Chief Justice Castille to participate in the decision of an issue having nothing to do with his prior participation in the case.

* * *

The Due Process Clause did not prohibit Chief Justice Castille from hearing Williams's case. That does not mean, however, that it was appropriate for him to do so. Williams cites a number of state court decisions and ethics opinions that prohibit a prosecutor from later serving as judge in a case that he has prosecuted. Because the Due Process Clause does not mandate recusal in cases such as this, it is up to state authorities—not this Court—to determine whether recusal should be required.

I would affirm the judgment of the Pennsylvania Supreme Court, and respectfully dissent from the Court's contrary conclusion.

JUSTICE THOMAS, dissenting.

The Court concludes that it violates the Due Process Clause for the chief justice of the Supreme Court of Pennsylvania, a former district attorney who was not the trial prosecutor in petitioner Terrance Williams' case, to review Williams' fourth petition for state postconviction review. *Ante*, at 10–11, 16. That conclusion is flawed. The specter of bias alone in a judicial proceeding is not a deprivation of due process. Rather than constitutionalize every judicial disqualification rule, the Court has left such rules to legislatures, bar associations, and the judgment of individual adjudicators. Williams, moreover, is not a criminal defendant. His complaint is instead that the due process protections in his state postconviction proceedings—an altogether new civil matter, not a continuation of his criminal trial—were lacking. Ruling in Williams' favor, the Court ignores this posture and our precedents commanding less of state postconviction proceedings than of criminal prosecutions involving defendants whose convictions are not yet final. I respectfully dissent.

I

A reader of the majority opinion might mistakenly think that the prosecution against Williams is ongoing, for the majority makes no mention of the fact that Williams' sentence has been final for more than 25 years. Because the postconviction posture of this case is of crucial importance in considering the question presented, I begin with the protracted procedural history of Williams' repeated attempts to collaterally attack his sentence.

A

Thirty-two years ago, Williams and his accomplice beat their victim to death with a tire iron and a socket wrench. *Commonwealth* v. *Williams*, 524 Pa. 218, 222–224, 570 A. 2d 75, 77–78 (1990) (*Williams I*). Williams later returned to the scene of the crime, a cemetery, soaked the victim's body in gasoline, and set it on fire. *Id.*, at 224, 570 A. 2d, at 78. After the trial against Williams commenced, both the Chief of the Homicide Unit and the District Attorney, Ronald Castille, approved the trial prosecutor's decision to seek the death penalty by signing a piece of paper. See App. 426. That was Castille's only involvement in Williams' criminal case. Thereafter, a Pennsylvania jury convicted Williams of first-degree murder, and he was sentenced to death. *Williams I*, 524 Pa., at 221–222, 570 A. 2d, at 77. The Supreme Court of Pennsylvania affirmed his conviction and sentence. *Id.*, at 235, 570 A. 2d, at 84.

Five years later, Williams filed his first petition for state postconviction relief. *Commonwealth* v. *Williams*, 581 Pa. 57, 65, 863 A. 2d 505, 509 (2004) (*Williams II*). The post-conviction court denied the petition. *Ibid.*, 863 A. 2d, at 510. Williams appealed, raising 23 alleged errors. *Ibid.* The Supreme Court of Pennsylvania, which included Castille in his new capacity as a justice of that court, affirmed the denial of relief. *Id.*, at 88, 863 A. 2d, at 523. The court rejected some claims on procedural grounds and denied the remaining claims on the merits. *Id.*, at 68–88, 863 A. 2d, at 511–523. The court's lengthy opinion did not mention the possibility of Castille's bias, and Williams apparently never asked for his recusal.

Then in 2005, Williams filed two more petitions for state postconviction relief. Both petitions were dismissed as untimely, and the Supreme Court of Pennsylvania affirmed. *Commonwealth* v. *Williams*, 589 Pa. 355, 909 A. 2d 297 (2006) (*per curiam*) (*Williams III*); *Commonwealth* v. *Williams*, 599 Pa. 495, 962 A. 2d 609 (2009) (*per curiam*) (*Williams IV*). Castille also presumably participated in those proceedings, but, again, Williams apparently did not ask for him to recuse.[1]

Williams then made a fourth attempt to vacate his sentence in state court in 2012. 629 Pa. 533, 537, 105 A. 3d 1234, 1237 (2014) (*Williams VI*). Williams alleged that the prosecution violated *Brady* v. *Maryland*, 373 U. S. 83 (1963), by failing to disclose exculpatory evidence. The allegedly exculpatory evidence was information about Williams' motive. According to Williams, the prosecution should have disclosed to his counsel that it knew that Williams and the victim had previously engaged in a sexual relationship when Williams was a minor. *Williams VI*, 629 Pa., at 538, 105

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[1] In 2005, Williams also filed a federal habeas petition, which the federal courts ultimately rejected. *Williams* v. *Beard*, 637 F. 3d 195, 238 (CA3 2011) (*Williams V*), cert. denied, *Williams* v. *Wetzel*, 567 U. S. 952 (2012).

A. 3d, at 1237.[2] The state postconviction court agreed and vacated his sentence. *Id.*, at 541, 105 A. 3d, at 1239.

The Commonwealth appealed to the Supreme Court of Pennsylvania. Only then—the *fourth* time that Williams appeared before Castille—did Williams ask him to recuse. App. 181. Castille denied the recusal motion and declined to refer it to the full court. *Id.*, at 171. Shortly thereafter, the court vacated the postconviction court's order and reinstated Williams' sentence. The court first noted that Williams' fourth petition "was filed over 20 years after [Williams'] judgment of sentence became final" and "was untimely on its face." *Williams VI*, 629 Pa., at 542, 105 A. 3d, at 1239. The court rejected the trial court's conclusion that an exception to Pennsylvania's timeliness rule applied and reached "the inescapable conclusion that [Williams] is not entitled to relief." *Id.*, at 541–545, 105 A. 3d, at 1239–1241; see also *id.*, at 551, 105 A. 3d, at 1245 (Castille, J., concurring) (writing separately "to address the important responsibilities of the [state postconviction] trial courts in serial capital [state postconviction] matters").

Finally, Williams filed an application for reargument. App. 9. The court denied the application *without* Castille's

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[2] Setting aside how a prosecutor could violate *Brady* by failing to disclose information to the defendant about the defendant's motive to kill, it is worth noting that this allegation merely repackaged old arguments. During a state postconviction hearing in 1998, Williams had presented evidence of his prior sexual abuse, including "multiple sexual victimizations (including sodomy) during his childhood," to support his ineffective assistance claim. *Williams II*, 581 Pa. 57, 98, 863 A. 2d 505, 530 (2004) (Saylor, J., dissenting). And he had "argued [that the victim] engaged in homosexual acts with him." *Williams VI*, 629 Pa., at 536, 105 A. 3d, at 1236. Then, in his federal habeas proceedings, Williams admitted that his plan on the night of the murder was to threaten to reveal to the victim's wife that the victim was a homosexual, and he contended that his attorney should have presented related evidence of the victim's prior sexual relationship with him. *Williams V, supra*, at 200, 225–226, 229–230.

participation. *Id.*, at 8. Castille had retired from the bench nearly two months before the court ruled.

B

As this procedural history illustrates, the question presented is hardly what the majority makes it out to be. The majority incorrectly refers to the case before us and Williams' criminal case (that ended in 1990) as a decades-long "single case" or "matter." *Ante*, at 10; see also *ante*, at 10–11. The majority frames the issue as follows: whether the Due Process Clause permits Castille to "ac[t] as both accuser and judge in [Williams'] case." *Ante*, at 8. The majority answers: "When a judge has served as an advocate for the State *in the very case* the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome." *Ante*, at 9 (emphasis added). Accordingly, the majority holds that "[w]here a judge has had an earlier significant, personal involvement as a prosecutor in a critical decision *in the defendant's case*, the risk of actual bias in the judicial proceeding rises to an unconstitutional level." *Ante*, at 16 (emphasis added). That is all wrong.

There has been, however, no "single case" in which Castille acted as both prosecutor and adjudicator. Castille was still serving in the district attorney's office when Williams' criminal proceedings ended and his sentence of death became final. Williams' filing of a petition for state postconviction relief did not continue (or resurrect) that already final criminal proceeding. A postconviction proceeding "is not part of the criminal proceeding itself" but "is in fact considered to be civil in nature," *Pennsylvania* v. *Finley*, 481 U. S. 551, 556–557 (1987), and brings with it fewer procedural protections. See, *e. g.*, *District Attorney's Office for Third Judicial Dist.* v. *Osborne*, 557 U. S. 52, 68 (2009).

Williams' case therefore presents a much different question from that posited by the majority. It is more accurately characterized as whether a judge may review a petition for postconviction relief when that judge previously served as district attorney while the petitioner's criminal case was pending. For the reasons that follow, that different question merits a different answer.

II

The "settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors" are the touchstone of due process. *Tumey* v. *Ohio*, 273 U. S. 510, 523 (1927); see also *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 277 (1856). What due process requires of the judicial proceedings in the Pennsylvania postconviction courts, therefore, is guided by the historical treatment of judicial disqualification. And here, neither historical practice nor this Court's case law constitutionalizing that practice requires a former prosecutor to recuse from a prisoner's postconviction proceedings.

A

At common law, a fair tribunal meant that "no man shall be a judge in his own case." 1 E. Coke, Institutes of the Laws of England §212, *141a ("*[A]liquis non debet esse judex in propiâ causâ*"). That common-law conception of a fair tribunal was a narrow one. A judge could not decide a case in which he had a direct and personal financial stake. For example, a judge could not reap the fine paid by a defendant. See, *e. g., Dr. Bonham's Case*, 8 Co. Rep. 107a, 114a, 118a, 77 Eng. Rep. 638, 647, 652 (C. P. 1610) (opining that a panel of adjudicators could not all at once serve as "judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture"). Nor could he adjudicate a case in which he was a party. See, *e. g., Earl of Derby's Case*, 12 Co. Rep. 114, 77 Eng. Rep. 1390 (K. B. 1614). But mere bias—without any financial stake in a case—was not grounds for disqualification. The biases of judges "cannot be challenged," according to Blackstone, "[f]or the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea." 3 W. Blackstone, Commentaries on the Laws of England 361 (1768) (Blackstone); see also, *e. g.*, *Brookes* v. *Earl of Rivers*, Hardres 503, 145 Eng. Rep. 569 (Exch. 1668) (deciding that a judge's "favour shall not be presumed" merely because his brother-in-law was involved).

The early American conception of judicial disqualification was in keeping with the "clear and simple" common-law rule—"a judge was disqualified for direct pecuniary interest and for nothing else." Frank, Disqualification of Judges, 56 Yale L. J. 605, 609 (1947) (Frank); see also R. Flamm, Judicial Disqualification: Recusal and Disqualification of Judges § 1.4, p. 7 (2d ed. 2007). Most jurisdictions required judges to recuse when they stood to profit from their involvement or, more broadly, when their property was involved. See *Moses* v. *Julian*, 45 N. H. 52, 55–56 (1863); see also, *e. g.*, *Jim* v. *State*, 3 Mo. 147, 155 (1832) (deciding that a judge was unlawfully interested in a criminal case in which his slave was the defendant). But the judge's pecuniary interest had to be directly implicated in the case. See, *e. g.*, *Davis* v. *State*, 44 Tex. 523, 524 (1876) (deciding that a judge, who was the victim of a theft, was not disqualified in the prosecution of the theft); see also T. Cooley, Constitutional Limitations 594 (7th ed. 1903) (rejecting a financial stake "so remote, trifling, and insignificant that it may fairly be supposed to be incapable of affecting the judgment"); *Moses*, *supra*, at 57 ("[A] creditor, lessee, or debtor, may be judge in the case of his debtor, landlord, or creditor, except in cases where the amount of the party's property involved in the suit is so great that his ability to meet his engagements with the judge may depend upon the success of his suit"); *Inhabitants of Readington Twp. Hunterdon County* v. *Dilley*, 24 N. J. L. 209, 212–213 (N. J. 1853) (deciding that a judge, who had previously been paid to survey the roadway at issue in the case, was not disqualified).

Shortly after the founding, American notions of judicial disqualification expanded in important respects. Of particular relevance here, the National and State Legislatures enacted statutes and constitutional provisions that diverged from the common law by requiring disqualification when the judge had served as counsel for one of the parties. The first federal recusal statute, for example, required disqualification not only when the judge was "concerned in interest," but also when he "ha[d] been of counsel for either party." Act of May 8, 1792, § 11, 1 Stat. 278–279. Many States followed suit by enacting similar disqualification statutes or constitutional provisions expanding the common-law rule. See, *e. g.*, *Wilks* v. *State*, 27 Tex. App. 381, 385, 11 S. W. 415, 416 (1889); *Fechheimer* v. *Washington*, 77 Ind. 366, 368 (1881) (*per curiam*); *Sjoberg* v. *Nordin*, 26 Minn. 501, 503, 5 N. W. 677, 678 (1880); *Whipple* v. *Saginaw Circuit Court Judge*, 26 Mich. 342, 343 (1873); *Mathis* v. *State*, 50 Tenn. 127, 128 (1871); but see *Owings* v. *Gibson*, 9 Ky. 515, 517–518 (1820) (deciding that it was for the judge to choose whether he could fairly adjudicate a case in which he had served as a lawyer for the plaintiff in the same action). Courts applied this expanded view of disqualification not only in cases involving judges who had previously served as counsel for private parties but also for those who previously served as former attorneys general or district attorneys. See, *e. g.*, *Terry* v. *State*, 24 S. W. 510, 510–511 (Tex. Crim. App. 1893); *Mathis*, *supra*, at 128.

This expansion was modest: disqualification was required only when the newly appointed judge had served as counsel in the *same case*. In *Carr* v. *Fife*, 156 U. S. 494 (1895), for example, this Court rejected the argument that a judge was required to recuse because he had previously served as counsel for some of the defendants in another matter. *Id.*, at 497–498. The Court left it to the judge "to decide for himself whether it was improper for him to sit in trial of the suit." *Id.*, at 498. Likewise, in *Taylor* v. *Williams*, 26 Tex. 583 (1863), the Supreme Court of Texas acknowledged that a judge was not, "by the common law, disqualified from sitting in a cause in which he had been of counsel" and concluded "that the fact that the presiding judge had been of counsel in the case did not necessarily render him interested in it." *Id.*, at 585–586. *A fortiori*, the Texas court held, a judge was not "interested" in a case "merely from his having been of counsel in *another cause* involving the same title." *Id.*, at 586 (emphasis added); see also *The Richmond*, 9 F. 863, 864 (CC ED La. 1881) ("The decisions, so far as I have been able to find, are unanimous that 'of counsel' means 'of counsel for a party in that cause and in that controversy,' and if either the cause or controversy is not identical the disqualification does not exist"); *Wolfe* v. *Hines*, 93 Ga. 329, 20 S. E. 322 (1894) (same); *Cleghorn* v. *Cleghorn*, 66 Cal. 309, 5 P. 516 (1885) (same).

This limitation—that the same person must act as counsel and adjudicator in *the same case*—makes good sense. At least one of the States' highest courts feared that any broader rule would wreak havoc: "If the circumstance of the judge having been of counsel, for some parties in some case involving some of the issues which had been theretofore tried[,] disqualified him from acting in every case in which any of those parties, or those issues should be subsequently involved, the most eminent members of the bar, would, by reason of their extensive professional relations and their large experience be rendered ineligible, or useless as judges." *Blackburn* v. *Craufurd*, 22 Md. 447, 459 (1864). Indeed, any broader rule would be at odds with this Court's historical practice. Past Justices have decided cases involving their former clients in the private sector or their former offices in the public sector. See Frank 622–625. The examples are legion; chief among them is *Marbury* v. *Madison*, 1 Cranch 137 (1803), in which then–Secretary of State John

Marshall sealed but failed to deliver William Marbury's commission and then, as newly appointed Chief Justice, Marshall decided whether mandamus was an available remedy to require James Madison to finish the job. See Paulsen, Marbury's Wrongness, 20 Constitutional Commentary 343, 350 (2003).

Over the next century, this Court entered the fray of judicial disqualifications only a handful of times. Drawing from longstanding historical practice, the Court announced that the Due Process Clause compels judges to disqualify in the narrow circumstances described below. But time and again, the Court cautioned that "[a]ll questions of judicial qualification may not involve constitutional validity." *Tumey*, 273 U. S., at 523. And "matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion." *Ibid.*; see also *Aetna Life Ins. Co.* v. *Lavoie*, 475 U. S. 813, 828 (1986) ("The Due Process Clause demarks only the outer boundaries of judicial disqualifications").

First, in *Tumey*, the Court held that due process would not tolerate an adjudicator who would profit from the case if he convicted the defendant. The Court's holding paralleled the common-law rule: "[I]t certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court, the judge of which has a *direct, personal, substantial pecuniary interest* in reaching a conclusion against him in his case." 273 U. S., at 523 (emphasis added); see also *Ward* v. *Monroeville*, 409 U. S. 57, 59, 61 (1972) (deciding that a mayor could not adjudicate traffic violations if revenue from convictions constituted a substantial portion of the municipality's revenue). Later, applying *Tumey*'s rule in *Aetna Life Ins.*, the Court held that a judge who decided a case involving an insurance company had a "direct, personal, substantial, and pecuniary" interest because he had brought a similar case against an insurer and his opinion for the court "had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case." 475 U. S., at 824 (alterations and internal quotation marks omitted).

Second, in *In re Murchison*, 349 U. S. 133 (1955), the Court adopted a constitutional rule resembling the historical practice for disqualification of former counsel. *Id.*, at 139. There, state law empowered a trial judge to sit as a " 'one-man judge-grand jury,' " meaning that he could "compel witnesses to appear before him in secret to testify about suspected crimes." *Id.*, at 133–134. During those secret proceedings, the trial judge suspected that one of the witnesses, Lee Roy Murchison, had committed perjury, and he charged another, John White, with contempt after he refused to answer the judge's questions without counsel present. See *id.*, at 134–135. The judge then tried both men in open court and convicted and sentenced them based, in part, on his interrogation of them in the secret proceedings. See *id.*, at 135, 138–139. The defendants appealed, arguing that the "trial before the judge who was at the same time the complainant, indicter and prosecutor, constituted a denial of fair and impartial trial required by" due process. *Id.*, at 135. This Court agreed: "It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations." *Id.*, at 137. Broadly speaking, *Murchison*'s rule constitutionalizes the early American statutes requiring disqualification when a single person acts as both counsel and judge in a single civil or criminal proceeding.[3]

[3] The Court has applied *Murchison* in later cases involving contempt proceedings in which a litigant's contemptuous conduct is so egregious that the judge "become[s] so 'personally embroiled' " in the controversy that it is as if the judge is a party himself. *Mayberry* v. *Pennsylvania*, 400 U. S. 455, 465 (1971); see also *Taylor* v. *Hayes*, 418 U. S. 488, 501–503 (1974).

Both *Tumey* and *Murchison* arguably reflect historical understandings of judicial disqualification. Traditionally, judges disqualified themselves when they had a direct and substantial pecuniary interest or when they served as counsel in the same case.

B

Those same historical understandings of judicial disqualification resolve Williams' case. Castille did not serve as both prosecutor and judge in the case before us. Even assuming Castille's supervisory role as district attorney was tantamount to serving as "counsel" in Williams' criminal case, that case ended nearly five years before Castille joined the Supreme Court of Pennsylvania. Castille then participated in a separate proceeding by reviewing Williams' petition for postconviction relief.

As discussed above, see Part I–B, *supra*, this postconviction proceeding is not an extension of Williams' criminal case but is instead a new civil proceeding. See *Finley*, 481 U. S., at 556–557. Our case law bears out the many distinctions between the two proceedings. In his criminal case, Williams was presumed innocent, *Coffin* v. *United States*, 156 U. S. 432, 453 (1895), and the Constitution guaranteed him counsel, *Gideon* v. *Wainwright*, 372 U. S. 335, 344–345 (1963); *Powell* v. *Alabama*, 287 U. S. 45, 68–69 (1932), a public trial by a jury of his peers, *Duncan* v. *Louisiana*, 391 U. S. 145, 149 (1968), and empowered him to confront the witnesses against him, *Crawford* v. *Washington*, 541 U. S. 36, 68 (2004), as well as all the other requirements of a criminal proceeding. But in postconviction proceedings, "the presumption of innocence [has] disappear[ed]." *Herrera* v. *Collins*, 506 U. S. 390, 399 (1993). The postconviction petitioner has no constitutional right to counsel. *Finley*, *supra*, at 555–557; see also *Johnson* v. *Avery*, 393 U. S. 483, 488 (1969). Nor has this Court ever held that he has a right to demand that his postconviction court consider a freestanding claim of actual innocence, *Herrera*, *supra*, at 417–419, or to demand the State to turn over exculpatory evidence, *Osborne*, 557 U. S., at 68–70; see also *Wright* v. *West*, 505 U. S. 277, 293 (1992) (plurality opinion) (cataloging differences between direct and collateral review and concluding that "[t]hese differences simply reflect the fact that habeas review entails significant costs" (internal quotation marks omitted)). And, under the Court's precedents, his due process rights are "not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief." *Osborne*, *supra*, at 69.

Because Castille did not act as both counsel and judge in the same case, Castille's participation in the postconviction proceedings did not violate the Due Process Clause. Castille might have been "personal[ly] involve[d] in a critical trial decision," *ante*, at 11, but that "trial" was Williams' criminal trial, not the postconviction proceedings before us now. Perhaps Castille's participation in Williams' postconviction proceeding was unwise, but it was within the bounds of historical practice. That should end this case, for it "is not for Members of this Court to decide from time to time whether a process approved by the legal traditions of our people is 'due' process." *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 28 (1991) (Scalia, J., concurring in judgment).

C

Today's holding departs both from common-law practice and this Court's prior precedents by ignoring the critical distinction between criminal and postconviction proceedings. Chief Justice Castille had no "direct, personal, substantial, pecuniary interest" in the adjudication of Williams' fourth postconviction petition. *Tumey*, 273 U. S., at 523. And although the majority invokes *Murchison*, *ante*, at 8–11, it wrongly relies on that decision too. In *Murchison*, the judge acted as both the accuser and judge in the *same* proceeding. 349 U. S., at 137–139. But here, Castille did not. See Part II–B, *supra*.

The perceived bias that the majority fears is instead outside the bounds of the historical expectations of judicial recusal. Perceived bias (without more) was not recognized as a constitutionally compelled ground for disqualification until the Court's recent decision in *Caperton* v. *A. T. Massey Coal Co.*, 556 U. S. 868 (2009). In *Caperton*, the Court decided that due process demanded disqualification when "extreme facts" proved "the probability of actual bias." *Id.*, at 886–887. *Caperton*, of course, elicited more questions than answers. *Id.*, at 893–898 (ROBERTS, C. J., dissenting). And its conclusion that bias alone could be grounds for disqualification as a constitutional matter "represents a complete departure from common law principles." Frank 618–619; see Blackstone 361 ("[T]he law will not suppose a possibility of bias or favor in a judge").

The Court, therefore, should not so readily extend *Caperton*'s "probability of actual bias" rule to state postconviction proceedings. This Court's precedents demand far less "process" in postconviction proceedings than in a criminal prosecution. See *Osborne*, *supra*, at 69; see also *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U. S. 886, 895 (1961) (concluding that the Due Process Clause does not demand "inflexible procedures universally applicable to every imaginable situation"). If a state habeas petitioner is not entitled to counsel as a constitutional matter in state postconviction proceedings, *Finley*, 481 U. S., at 555–557, it is not unreasonable to think that he is likewise not entitled to demand, as a constitutional matter, that a state postconviction court consider his case anew because a judge, who had no direct and substantial pecuniary interest and had not served as counsel in this case, failed to recuse himself.

The bias that the majority fears is a problem for the state legislature to resolve, not the Federal Constitution. See, *e. g.*, *Aetna Life Ins.*, 475 U. S., at 821 ("We need not decide whether allegations of bias or prejudice by a judge of the type we have here would ever be sufficient under the Due Process Clause to force recusal"). And, indeed, it appears that Pennsylvania has set its own standard by requiring a judge to disqualify if he "served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding" in its Code of Judicial Conduct. See Pa. Code of Judicial Conduct Rule 2.11(A)(6)(b) (West 2016). Officials in Pennsylvania are fully capable of deciding when their judges have "participated personally and substantially" in a manner that would require disqualification without this Court's intervention. Due process requires no more, especially in state postconviction review where the States "ha[ve] more flexibility in deciding what procedures are needed." *Osborne, supra,* at 69.

III

Even if I were to assume that an error occurred in Williams' state postconviction proceedings, the question remains whether there is anything left for the Pennsylvania courts to remedy. There is not.

The majority remands the case to "[a]llo[w] an appellate panel to reconsider a case without the participation of the interested member," which it declares "will permit judges to probe lines of analysis or engage in discussions they may have felt constrained to avoid in their first deliberations." *Ante,* at 16. The majority neglects to mention that the Supreme Court of Pennsylvania might have done just that. It entertained Williams' motion for reargument without Castille, who had retired months before the court denied the motion. The Supreme Court of Pennsylvania is free to decide on remand that it cured any alleged deprivation of due process in Williams' postconviction proceeding by considering his motion for reargument without Castille's participation.

* * *

This is not a case about the "'accused.'" *Ibid.* (quoting *Tumey, supra*, at 532). It is a case about the due process rights of the already convicted. Whatever those rights might be, they do not include policing alleged violations of state codes of judicial ethics in postconviction proceedings. The Due Process Clause does not require any and all conceivable procedural protections that Members of this Court think "Western liberal democratic government ought to guarantee to its citizens." Monaghan, Our Perfect Constitution, 56 N. Y. U. L. Rev. 353, 358 (1981) (emphasis deleted). I respectfully dissent.

DIETZ *v.* BOULDIN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15–458. Argued April 26, 2016—Decided June 9, 2016

Petitioner Rocky Dietz sued respondent Hillary Bouldin for negligence for injuries suffered in an automobile accident. Bouldin removed the case to Federal District Court. At trial, Bouldin admitted liability and stipulated to damages of $10,136 for Dietz' medical expenses. The only disputed issue remaining was whether Dietz was entitled to more. During deliberations, the jury sent the judge a note asking whether Dietz' medical expenses had been paid and, if so, by whom. Although the judge was concerned that the jury may not have understood that a verdict of less than the stipulated amount would require a mistrial, the judge, with the parties' consent, responded only that the information being sought was not relevant to the verdict. The jury returned a verdict in Dietz' favor but awarded him $0 in damages.

After the verdict, the judge discharged the jury, and the jurors left the courtroom. Moments later, the judge realized the error in the $0 verdict and ordered the clerk to bring back the jurors, who were all in the building—including one who may have left for a short time and returned. Over the objection of Dietz' counsel and in the interest of judicial economy and efficiency, the judge decided to recall the jury. After questioning the jurors as a group, the judge was satisfied that none had spoken about the case to anyone and ordered them to return the next morning. After receiving clarifying instructions, the reassembled jury returned a verdict awarding Dietz $15,000 in damages. On appeal, the Ninth Circuit affirmed.

Held: A federal district court has a limited inherent power to rescind a jury discharge order and recall a jury in a civil case for further deliberations after identifying an error in the jury's verdict. The District Court did not abuse that power here. Pp. 45–54.

(a) The inherent powers that district courts possess "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases," *Link* v. *Wabash R. Co.*, 370 U. S. 626, 630–631, have certain limits. The exercise of an inherent power must be a "reasonable response to the problems and needs" confronting the court's fair administration of justice and cannot be contrary to any express grant of, or limitation on, the district court's power contained in a rule or statute. *Degen* v. *United States*, 517 U. S. 820, 823–824. These two principles support the conclusion here.

First, rescinding a discharge order and recalling the jury can be a reasonable response to correcting an error in the jury's verdict in certain circumstances, and is similar in operation to a district court's express power under Federal Rule of Civil Procedure 51(b)(3) to give the jury a curative instruction and order them to continue deliberating to correct an error in the verdict before discharge. Other inherent powers possessed by district courts, *e. g.*, a district court's inherent power to modify or rescind its orders before final judgment in a civil case, see *Marconi Wireless Telegraph Co. of America* v. *United States*, 320 U. S. 1, 47–48, or to manage its docket and courtroom with a view toward the efficient and expedient resolution of cases, see *Landis* v. *North American Co.*, 299 U. S. 248, 254, also support this conclusion.

Second, rescinding a discharge order to recall a jury does not violate any other rule or statute. No implicit limitation in Rule 51(b)(3) prohibits a court from rescinding its discharge order and reassembling the jury. Nor are such limits imposed by other rules dealing with post-verdict remedies. See, *e. g.*, Fed. Rules Civ. Proc. 50(b), 59(a)(1)(A). Pp. 45–48

(b) This inherent power must be carefully circumscribed, especially in light of the guarantee of an impartial jury. Because discharge releases a juror from the obligations to avoid discussing the case outside the jury room and to avoid external prejudicial information, the potential that a jury reassembled after being discharged might be tainted looms large. Thus, any suggestion of prejudice should counsel a district court not to exercise its inherent power. The court should determine whether any juror has been directly tainted and should also take into account additional factors that can indirectly create prejudice, which, at a minimum, include the length of delay between discharge and recall, whether the jurors have spoken to anyone about the case after discharge, and any emotional reactions to the verdict witnessed by the jurors. Courts should also ask to what extent just-dismissed jurors accessed their smartphones or the Internet.

Applying those factors here, the District Court did not abuse its discretion. The jury was out for only a few minutes, and, with the exception of one juror, remained inside the courthouse. The jurors did not speak to any person about the case after discharge. And, there is no indication in the record that the verdict generated any kind of emotional reaction or electronic exchanges or searches that could have tainted the jury. Pp. 48–51.

(c) Dietz' call for a categorical bar on reempaneling a jury after discharge is rejected. Even assuming that at common law a discharged jury could never be brought back, the advent of modern federal trial practice limits the common law's relevance as to the specific question raised here. There is no benefit to imposing a rule that says that as soon as a jury is free to go a judge categorically cannot rescind that order to correct an easily identified and fixable mistake. And Dietz' "functional" discharge test, which turns on whether the jurors remain within the district court's "presence and control," *i. e.*, within the courtroom, raises similar problems. Pp. 51–54.

794 F. 3d 1093, affirmed.

Sotomayor, J., delivered the opinion of the Court, in which Roberts, C. J., and Ginsburg, Breyer, Alito, and Kagan, JJ., joined. Thomas, J., filed a dissenting opinion, in which Kennedy, J., joined, *post*, p. 54.

Kannon K. Shanmugam argued the cause for petitioner. With him on the briefs were *Allison B. Jones* and *Geoffrey C. Angel*.

Neal Kumar Katyal argued the cause for respondent. With him on the brief were *Frederick Liu* and *Jesse Beaudette*.

John F. Bash argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Caldwell*, and *Deputy Solicitor General Kneedler*.

Justice Sotomayor delivered the opinion of the Court.

In this case, a jury returned a legally impermissible verdict. The trial judge did not realize the error until shortly after he excused the jury. He brought the jury back and ordered them to deliberate again to correct the mistake. The question before us is whether a federal district court can recall a jury it has discharged, or whether the court can remedy the error only by ordering a new trial.

This Court now holds that a federal district court has the inherent power to rescind a jury discharge order and recall a jury for further deliberations after identifying an error in the jury's verdict. Because the potential of tainting jurors and the jury process after discharge is extraordinarily high, however, this power is limited in duration and scope, and must be exercised carefully to avoid any potential prejudice.

I

Petitioner Rocky Dietz was driving through an intersection in Bozeman, Montana, when Hillary Bouldin ran the red light and T-boned Dietz. As a result of the accident, Dietz suffered injuries to his lower back that caused him severe pain. He sought physical therapy, steroid injections, and other medications to treat his pain. Dietz sued Bouldin for negligence. Bouldin removed the case to Federal District Court. See 28 U. S. C. §§ 1332, 1441.

At trial, Bouldin admitted that he was at fault for the accident and that Dietz was injured as a result. Bouldin also stipulated that Dietz' medical expenses of $10,136 were reasonable and necessary as a result of the collision. The only disputed issue at trial for the jury to resolve was whether Dietz was entitled to damages above $10,136.

During deliberations, the jury sent the judge a note asking: " 'Has the $10,136 medical expenses been paid; and if so, by whom?' " App. 36. The court discussed the note with the parties' attorneys and told them he was unsure whether the jurors understood that their verdict could not be less than that stipulated amount, and that a mistrial would be required if the jury did not return a verdict of at least $10,136. The judge, however, with the consent of both parties, told the jury that the information they sought was not relevant to the verdict.

The jury returned a verdict in Dietz' favor but awarded him $0 in damages. The judge thanked the jury for its service and ordered them "discharged," telling the jurors they were "free to go." App. to Pet. for Cert. 25a. The jurors gathered their things and left the courtroom.

A few minutes later, the court ordered the clerk to bring the jurors back. Speaking with counsel outside the jury's presence, the court explained that it had "just stopped the jury from leaving the building," after realizing that the $0 verdict was not "legally possible in view of stipulated damages exceeding $10,000." *Id.*, at 26a. The court suggested two alternatives: (1) order a new trial or (2) reempanel the jurors, instructing them to award at least the stipulated damages and ordering them to deliberate anew.

Dietz' attorney objected to reempaneling the discharged jurors, arguing that the jury was no longer capable of returning a fair and impartial verdict. The court reiterated that none of the jurors had left the building, and asked the clerk whether any had even left the floor where the courtroom was located. The clerk explained that only one juror had left the building to get a hotel receipt and bring it back.

Before the jurors returned, the judge told the parties that he planned to order the jury to deliberate again and reach a different verdict. The judge explained that he would "hate to just throw away the money and time that's been expended in this trial." *Id.*, at 28a. When the jurors returned to the courtroom, the judge questioned them as a group and confirmed that they had not spoken to anyone about the case.

The judge explained to the jurors the mistake in not awarding the stipulated damages. He informed the jurors that he was reempaneling them and would ask them to start over with clarifying instructions. He asked the jurors to confirm that they understood their duty and to return the next morning to deliberate anew. The next day, the reassembled jury returned a verdict awarding Dietz $15,000 in damages.

On appeal, the Ninth Circuit affirmed. 794 F. 3d 1093 (2015). The court held that a district court could reempanel the jury shortly after dismissal as long as during the period of dismissal, the jurors were not exposed to any outside influences that would compromise their ability to reconsider the verdict fairly. This Court granted Dietz' petition for a writ of certiorari to resolve confusion in the Courts of Appeals on whether and when a federal district court has the authority to recall a jury after discharging it. 577 U. S. 1101 (2016). See *Wagner* v. *Jones*, 758 F. 3d 1030, 1034–1035 (CA8 2014), cert. denied, 575 U. S. 902 (2015); *United States*

v. *Figueroa*, 683 F. 3d 69, 72–73 (CA3 2012); *United States* v. *Rojas*, 617 F. 3d 669, 677–678 (CA2 2010); *United States* v. *Marinari*, 32 F. 3d 1209, 1214 (CA7 1994); *Summers* v. *United States*, 11 F. 2d 583, 585–587 (CA4 1926).

II

A

The Federal Rules of Civil Procedure set out many of the specific powers of a federal district court. But they are not all encompassing. They make no provision, for example, for the power of a judge to hear a motion *in limine*,[1] a motion to dismiss for *forum non conveniens*,[2] or many other standard procedural devices trial courts around the country use every day in service of Rule 1's paramount command: the just, speedy, and inexpensive resolution of disputes.

Accordingly, this Court has long recognized that a district court possesses inherent powers that are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link* v. *Wabash R. Co.*, 370 U. S. 626, 630–631 (1962); see also *United States* v. *Hudson*, 7 Cranch 32, 34 (1812). Although this Court has never precisely delineated the outer boundaries of a district court's inherent powers, the Court has recognized certain limits on those powers.

First, the exercise of an inherent power must be a "reasonable response to the problems and needs" confronting the court's fair administration of justice. *Degen* v. *United States*, 517 U. S. 820, 823–824 (1996). Second, the exercise of an inherent power cannot be contrary to any express grant of or limitation on the district court's power contained in a rule or statute. See *id.*, at 823; Fed. Rule Civ. Proc. 83(b) (district courts can "regulate [their] practice in any manner

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[1] *Luce* v. *United States*, 469 U. S. 38, 41, n. 4 (1984).

[2] *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 507–508 (1947).

consistent with federal law"); see, *e. g., Bank of Nova Scotia* v. *United States*, 487 U. S. 250, 254 (1988) (holding that a district court cannot invoke its inherent power to "circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a)"). These two principles—an inherent power must be a reasonable response to a specific problem and the power cannot contradict any express rule or statute—support the conclusion that a district judge has a limited inherent power to rescind a discharge order and recall a jury in a civil case where the court discovers an error in the jury's verdict.

First, rescinding a discharge order and recalling the jury can be a reasonable response to correcting an error in the jury's verdict in certain circumstances. In the normal course, when a court recognizes an error in a verdict before it discharges the jury, it has the express power to give the jury a curative instruction and order them to continue deliberating. See Fed. Rule Civ. Proc. 51(b)(3) ("The court . . . may instruct the jury at any time before the jury is discharged"); 4 L. Sand et al., Modern Federal Jury Instructions–Civil ¶78.01, Instruction 78–10, p. 78–31 (2015) (Sand) (when a jury returns an inconsistent verdict, "[r]esubmitting the verdict . . . to resolve the inconsistencies is often the preferable course"). The decision to recall a jury to give them what would be an identical predischarge curative instruction could be, depending on the circumstances, similarly reasonable.

This conclusion is buttressed by this Court's prior cases affirming a district court's inherent authority in analogous circumstances. For example, the Court has recognized that a district court ordinarily has the power to modify or rescind its orders at any point prior to final judgment in a civil case. *Marconi Wireless Telegraph Co. of America* v. *United States*, 320 U. S. 1, 47–48 (1943); see also Fed. Rule Civ. Proc. 54(b) (district court can revise partial final judgment order absent certification of finality); *Fernandez* v. *United States*, 81 S. Ct.

642, 644, 5 L. Ed. 2d 683, 686 (1961) (Harlan, J., in chambers) (district court has inherent power to revoke order granting bail).

Here, the District Court rescinded its order discharging the jury before it issued a final judgment. Rescinding the discharge order restores the legal status quo before the court dismissed the jury. The District Court is thus free to reinstruct the jury under Rule 51(b)(3).

This Court has also held that district courts have the inherent authority to manage their dockets and courtrooms with a view toward the efficient and expedient resolution of cases. See, *e. g., Landis* v. *North American Co.*, 299 U. S. 248, 254 (1936) (district court has inherent power to stay proceedings pending resolution of parallel actions in other courts); *Link*, 370 U. S., at 631–632 (district court has inherent power to dismiss case *sua sponte* for failure to prosecute); *Chambers* v. *NASCO, Inc.*, 501 U. S. 32, 44 (1991) (district court has inherent power to vacate judgment procured by fraud); *United States* v. *Morgan*, 307 U. S. 183, 197–198 (1939) (district court has inherent power to stay disbursement of funds until revised payments are finally adjudicated).

This Court's recognition of these other inherent powers designed to resolve cases expeditiously is consistent with recognizing an inherent power to recall a discharged jury and reempanel the jurors with curative instructions. Compared to the alternative of conducting a new trial, recall can save the parties, the court, and society the costly time and litigation expense of conducting a new trial with a new set of jurors.

Second, rescinding a discharge order to recall a jury does not violate any other rule or statute. Rule 51(b)(3) states that a court "may instruct the jury at any time before the jury is discharged." A judge obviously cannot instruct a jury that is discharged—it is no longer there. But there is no implicit limitation in Rule 51(b)(3) that prohibits a court from rescinding its discharge order and reassembling the jury. See *Link*, 370 U. S., at 630 (holding that Rule 41(b)'s allowance for a party to move to dismiss for failure to prosecute did not implicitly abrogate the court's power to dismiss *sua sponte*). Other rules dealing with postverdict remedies such as a motion for a new trial or a motion for judgment notwithstanding the verdict, see Fed. Rules Civ. Proc. 50(b), 59(a)(1)(A), similarly do not place limits on a court's ability to rescind a prior order discharging a jury. Accordingly, a federal district court can rescind a discharge order and recall a jury in a civil case as an exercise of its inherent powers.

B

Just because a district court has the inherent power to rescind a discharge order does not mean that it is appropriate to use that power in every case. Because the exercise of an inherent power in the interest of promoting efficiency may risk undermining other vital interests related to the fair administration of justice, a district court's inherent powers must be exercised with restraint. See *Chambers*, 501 U. S., at 44 ("Because of their very potency, inherent powers must be exercised with restraint and discretion").

The inherent power to rescind a discharge order and recall a dismissed jury, therefore, must be carefully circumscribed, especially in light of the guarantee of an impartial jury that is vital to the fair administration of justice. This Court's precedents implementing this guarantee have noted various external influences that can taint a juror. *E. g., Remmer* v. *United States*, 347 U. S. 227, 229 (1954) ("In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial"). Parties can accordingly ask that a juror be excused during trial for good cause, Fed. Rule Civ. Proc. 47(c), or challenge jury verdicts based on improper extraneous influences such as prejudicial information not admitted into evidence, comments from a court employee about the defendant, or bribes offered to a juror, *Warger* v. *Shauers*, 574 U. S. 40, 51 (2014) (citing *Tanner* v. *United States*, 483 U. S. 107, 117 (1987)); see also *Mattox* v. *United States*, 146 U. S. 140, 149–150 (1892) (external prejudicial information); *Parker* v. *Gladden*, 385 U. S. 363, 365 (1966) (*per curiam*) (bailiff comments on defendant); *Remmer*, 347 U. S., at 228–230 (bribe offered to juror).

The potential for taint looms even larger when a jury is reassembled after being discharged. While discharged, jurors are freed from instructions from the court requiring them not to discuss the case with others outside the jury room and to avoid external prejudicial information. See, *e. g.*, 4 Sand ¶71.02 (standard instruction to avoid extraneous influences); see also *id.*, ¶71.01, Instructions 71–12 to 71–14 (avoid publicity). For example, it is not uncommon for attorneys or court staff to talk to jurors postdischarge for their feedback on the trial. See 1 K. O'Malley et al., Federal Jury Practice and Instructions § 9:8 (6th ed. 2006) (debating appropriateness of practice).

Any suggestion of prejudice in recalling a discharged jury should counsel a district court not to exercise its inherent power. A district court that is considering whether it should rescind a discharge order and recall a jury to correct an error or instead order a new trial should, of course, determine whether any juror has been directly tainted—for example, if a juror discusses the strength of the evidence with nonjurors or overhears others talking about the strength of the evidence. But the court should also take into account at least the following additional factors that can indirectly create prejudice in this context, any of which standing alone could be dispositive in a particular case.

First, the length of delay between discharge and recall. The longer the jury has been discharged, the greater the likelihood of prejudice. Freed from the crucible of the jury's group decisionmaking enterprise, discharged jurors may begin to forget key facts, arguments, or instructions from the court. In taking off their juror "hats" and returning to their lives, they may lose sight of the vital collective role they played in the impartial administration of justice. And they are more likely to be exposed to potentially prejudicial sources of information or discuss the case with others, even if they do not realize they have done so or forget when questioned after being recalled by the court. How long is too long is left to the discretion of the district court, but it could be as short as even a few minutes, depending on the case.

Second, whether the jurors have spoken to anyone about the case after discharge. This could include court staff, attorneys and litigants, press and sketch artists, witnesses, spouses, friends, and so on. Even apparently innocuous comments about the case from someone like a courtroom deputy such as "job well done" may be sufficient to taint a discharged juror who might then resist reconsidering her decision.

Third, the reaction to the verdict. Trials are society's way of channeling disputes into fair and impartial resolutions. But these disputes can be bitter and emotional. And, depending on the case, those emotions may be broadcasted to the jury in response to their verdict. Shock, gasps, crying, cheers, and yelling are common reactions to a jury verdict—whether as a verdict is announced in the courtroom or seen in the corridors after discharge.

In such a case, there is a high risk that emotional reactions will cause jurors to begin to reconsider their decision and ask themselves, "Did I make the right call?" Of course, this concern would be present even in a decision to reinstruct the jury to fix an error after the verdict is announced but before they are discharged. See Fed. Rule Civ. Proc. 51(b)(3). Even so, after discharging jurors from their obligations and the passage of time, a judge should be reluctant to reempanel a jury that has witnessed emotional reactions to its verdict.

In considering these and any other relevant factors, courts should also ask to what extent just-dismissed jurors accessed their smartphones or the Internet, which provide other avenues for potential prejudice. It is a now-ingrained instinct to check our phones whenever possible. Immediately after discharge, a juror could text something about the case to a spouse, research an aspect of the evidence on Google, or read reactions to a verdict on Twitter. Prejudice can come through a whisper or a byte.

Finally, we caution that our recognition here of a court's inherent power to recall a jury is limited to civil cases only. Given additional concerns in criminal cases, such as attachment of the double jeopardy bar, we do not address here whether it would be appropriate to recall a jury after discharge in a criminal case. See *Smith* v. *Massachusetts*, 543 U. S. 462, 473–474 (2005).

Applying these factors, the District Court here did not abuse its discretion by rescinding its discharge order and recalling the jury to deliberate further. The jury was out for only a few minutes after discharge. Only one juror may have left the courthouse, apparently to retrieve a hotel receipt. The jurors did not speak to any person about the case after discharge. There is no indication in the record that this run-of-the-mill civil case—where the parties agreed that the defendant was liable and disputed damages only—generated any kind of emotional reaction or electronic exchanges or searches that could have tainted the jury. There was no apparent potential for prejudice by recalling the jury here.

III

Dietz asks us to impose a categorical bar on reempaneling a jury after it has been discharged. He contends that, at common law, a jury once discharged could never be brought back together again. Accordingly, he argues, without a " 'long unquestioned' power" of courts recalling juries, a federal district court lacks the inherent power to rescind a discharge order. See *Carlisle* v. *United States*, 517 U. S. 416, 426–427 (1996) (district court lacked inherent authority to grant untimely motion for judgment of acquittal).

We disagree. Even assuming that the common-law tradition is as clear as Dietz contends, but see, *e. g., Prussel* v. *Knowles*, 5 Miss. 90, 95–97 (1839) (allowing postdischarge recall), the common law is less helpful to understanding modern civil trial practice. At common law, any error in the process of rendering a verdict, no matter how technical or inconsequential, could be remedied only by ordering a new trial. But modern trial practice did away with this system, replacing it with the harmless-error standard now embodied in Rule 61. See *Kotteakos* v. *United States*, 328 U. S. 750, 758, 760 (1946) (recognizing predecessor statute to Rule 61 codified the "salutary policy" of "substitut[ing] judgment for automatic . . . rules").

Jury practice itself no longer follows the strictures of the common law. The common law required that juries be sequestered from the rest of society until they reached a verdict. Tellier, Separation or Dispersal of Jury in Civil Case After Submission, 77 A. L. R. 2d 1086 (1961). This generally meant no going home at night, no lunch breaks, no dispersing at all until they reached a verdict. *Id.*, §2; see also *Lester* v. *Stanley*, 15 F. Cas. 396, 396–397 (No. 8,277) (Conn. 1808) (Livingston, Circuit Justice) (following common law). Courts are no longer required to impose these requirements on juries in order to prevent possible prejudice. See *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 554 (1976) (cases requiring sequestration to avoid trial publicity "are relatively rare"); *Drake* v. *Clark*, 14 F. 3d 351, 358 (CA7 1994) ("Sequestration is an extreme measure, one of the most burdensome tools of the many available to assure a fair trial"). Accordingly, while courts should not think they are generally free to discover new inherent powers that are contrary to civil practice as recognized in the common law, see *Carlisle*, 517 U. S., at 426–427, the advent of modern federal trial practice limits the common law's relevance as to the specific question whether a judge can recall a just-discharged jury.

Dietz also argues that the nature of a jury's deliberative process means that something about the jury is irrevocably broken once the jurors are told they are free to go. According to Dietz, with their bond broken, the jurors cannot be brought back together again as a "jury." In other words, once a jury is discharged, a court can never put the jury back together again by rescinding its discharge order—legally or metaphysically.

We reject this "Humpty Dumpty" theory of the jury. Juries are of course an integral and special part of the American system of civil justice. Our system cannot function without the dedication of citizens coming together to perform their civic duty and resolve disputes.

But there is nothing about the jury as an entity that ceases to exist simply because the judge tells the jury that they are excused from further service. A discharge order is not a magical invocation. It is an order, like any other order.

And, like any order, it can be issued by mistake. All judges make mistakes. (Even us.) See *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (Jackson, J., concurring in judgment) ("We are not final because we are infallible, but we are infallible only because we are final"). There is no benefit to imposing a rule that says that as soon as a jury is free to go a judge categorically cannot rescind that order to correct an easily identified and fixable mistake, even as the jurors are still in the courtroom collecting their things.

Dietz does not suggest the Court adopt a magic-words rule, but instead urges the adoption of a "functional" discharge test based on whether the jurors remain within the "presence and control" of the district court, where control is limited to the courtroom itself. Tr. of Oral Arg. 5–7. Similarly, the dissent suggests that it is the chance "to mingle with the bystanders" that creates a discharge that cannot be undone. *Post*, at 55 (opinion of THOMAS, J.) (internal quotation marks and brackets omitted). These tests do not avoid the problems that Dietz and the dissent identify with a prejudice inquiry. Under a courtroom test, what if a juror has one foot over the line? What if she just stepped out to use the restroom? Under a courthouse test, what if she is just outside the doors? Reached her car in the parking lot? Under a bystander test, is a courtroom deputy in the jury room a mingling bystander? There is no good reason to prefer a test based on geography or identity over an inquiry focused on potential prejudice.

Finally, Dietz argues that the District Court in this case erred by questioning the discharged jurors as a group before reempaneling them instead of questioning each and every juror individually. While individual questioning could be the better practice in many circumstances, Dietz' attorney raised no objection to this part of the court's process. We decline to review this forfeited objection. See Fed. Rule Civ. Proc. 46.

* * *

Federal district courts have a limited inherent power to rescind a discharge order and recall a jury in a civil case. District courts should exercise this power cautiously and courts of appeals should review its invocation carefully. That was done here. The judgment of the Court of Appeals for the Ninth Circuit is therefore

Affirmed.

JUSTICE THOMAS, with whom JUSTICE KENNEDY joins, dissenting.

Justice Holmes famously quipped, "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897). But old rules often stand the test of time because wisdom underlies them. The common-law rule prohibiting a judge from recalling the jury after it is discharged is one such rule. Even though contemporary jurors are not formally sequestered as they were at common law, they are still subject to significant restrictions designed to prevent undue influence. And in today's world of cellphones, wireless Internet, and 24/7 news coverage, the rationale that undergirds the bright-line rule supplied by the common law is even more relevant: Jurors may easily come across prejudicial information when, after trial, the court lifts their restrictions on outside information. I would therefore hew to that rule rather than adopt the majority's malleable multifactor test for prejudice. I respectfully dissent.

At common law, once the judge discharged the jury and the jury could interact with the public, the judge could not recall the jury to amend the verdict. See *Sargent* v. *State*, 11 Ohio 472, 473 (1842); *Mills* v. *Commonwealth*, 34 Va. 751, 752 (1836); *Little* v. *Larrabee*, 2 Me. 37, 40 (1822). It was not " 'the mere announcement' " that the jury was discharged, but rather the chance to " 'mingl[e] with the bystanders' " that triggered the prohibition against recalling them. *Summers* v. *United States*, 11 F. 2d 583, 586 (CA4 1926) (quoting A. Abbott, A Brief for the Trial of Criminal Cases 730 (2d ed. 1902)). At that point, the court could not fix a substantive error made by the jury, including "returning a verdict against the *wrong party*; or, if not so, for a *larger* or *smaller* sum than they intended." *Little*, *supra*, at 39; see also *Jackson* v. *Williamson*, 2 T. R. 281, 281–282, 100 Eng. Rep. 153 (K. B. 1788) (refusing to allow an amendment to the verdict after the jury was discharged even though all jurors signed an affidavit explaining that they intended to award more in damages).*

The theory underpinning this rule was simple: Jurors, as the judges of fact, must avoid the possibility of prejudice.

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*Although courts could not fix substantive errors by recalling the jury, they could correct clerical errors in the reporting of the verdict. See *Little* v. *Larrabee*, 2 Me. 37, 38 (1822).

They have long been prohibited from having *ex parte* communications with the parties during a trial or receiving evidence in private. 3 W. Blackstone, Commentaries *375–*376. But once the jury is discharged, the jurors "become accessible to the parties and subject to their influence." *Little*, *supra*, at 39. In drawing the line at the *opportunity* to mingle, the common-law rule was prophylactic. But that is a desirable feature when public confidence in the judicial system is at stake.

It is true, as the Court explains, that jurors are no longer sequestered from the public. *Ante*, at 52. But remnants of sequestration remain. Jurors are prohibited from *ex parte* contact with the parties and the judge. They are not allowed to gather outside information about the case. And courthouses have private rooms for jurors, to shield them from *ex parte* information during recesses and deliberations.

Even without full sequestration, the common-law rule remains sensible and administrable. After discharge, the court has no power to impose restrictions on jurors, and jurors are no longer under oath to obey them. Jurors may access their cellphones and get public information about the case. They may talk to counsel or the parties. They may overhear comments in the hallway as they leave the courtroom. And they may reflect on the case—away from the pressure of the jury room—in a way that could induce them to change their minds. The resulting prejudice can be hard to detect. And a litigant who suddenly finds himself on the losing end of a materially different verdict may be left to wonder what may have happened in the interval between the jury's discharge and its new verdict. Granting a new trial may be inconvenient, but at least litigants and the public will be more confident that the verdict was not contaminated by improper influence after the trial has ended. And under this bright-line rule, district courts would take greater care in discharging the jury.

In contrast, the only thing that is clear about the majority's multifactor test is that it will produce more litigation.

This multifactor test may aid in identifying relevant facts for analysis, but—like most multifactor tests—it leaves courts adrift once those facts have been identified. The majority instructs district judges to look at "the length of delay between discharge and recall," "whether the jurors have spoken to anyone about the case after discharge," "the reaction to the verdict," and whether jurors have had access to their cellphones or the Internet. *Ante*, at 49–50. But in collecting these factors, the majority offers little guidance on how courts should apply them. Is one hour too long? How about two hours or two days? Does a single Internet search by a juror preclude recalling the entire jury? How many factors must be present to shift the balance against recalling the jury? All the majority says is that any factor "standing alone *could* be dispositive in a particular case." *Ante*, at 49 (emphasis added).

The majority's factors thus raise more questions than they answer. Parties will expend enormous effort litigating and appealing these questions. And when the Courts of Appeals inevitably fail to agree on what constitutes prejudice, we will be called on again to sort it out. As the Court of King's Bench recognized over two centuries ago, "it was better that the present plaintiff should suffer an inconvenience" than to head down this murky path. *Jackson*, *supra*, at 282, 100 Eng. Rep., at 153.

All rules have their drawbacks. The common-law rule, on occasion, may unnecessarily force a district court to redo a trial for a minor substantive mistake in the verdict. But the majority's multifactor test will only create more confusion. It would be much simpler to instruct the district courts, when they find a mistake in the verdict after the jury is dismissed, to hold a new trial.

The jurors here had the chance to mingle with the outside world after the District Court's discharge order released them from their oaths. After the announcement of discharge, the jurors entered public spaces in which interaction with nonjurors was possible. At that point, the jurors no longer were within the court's control and, therefore, were in fact discharged. Although the record does not indicate one way or the other, it is also possible that the jurors had access to cellphones or other wireless devices in circumstances where they understood themselves to have been released from any directions or limitations the judge had imposed on the use of those devices during trial.

Because the District Court reconvened the jury after discharge to deliberate anew, I would reverse the Court of Appeals' judgment affirming the verdict and remand for a new trial. I respectfully dissent.

COMMONWEALTH OF PUERTO RICO *v.* SANCHEZ VALLE ET AL.

CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

No. 15–108. Argued January 13, 2016—Decided June 9, 2016

Respondents Luis Sánchez Valle and Jaime Gómez Vázquez each sold a gun to an undercover police officer. Puerto Rican prosecutors indicted them for illegally selling firearms in violation of the Puerto Rico Arms Act of 2000. While those charges were pending, federal grand juries also indicted them, based on the same transactions, for violations of analogous U. S. gun trafficking statutes. Both defendants pleaded guilty to the federal charges and moved to dismiss the pending Commonwealth charges on double jeopardy grounds. The trial court in each case dismissed the charges, rejecting prosecutors' arguments that Puerto Rico and the United States are separate sovereigns for double jeopardy purposes and so could bring successive prosecutions against each defendant. The Puerto Rico Court of Appeals consolidated the cases and reversed. The Supreme Court of Puerto Rico granted review and held, in line with the trial court, that Puerto Rico's gun sale prosecutions violated the Double Jeopardy Clause.

Held: The Double Jeopardy Clause bars Puerto Rico and the United States from successively prosecuting a single person for the same conduct under equivalent criminal laws. Pp. 66–78.

(a) Ordinarily, a person cannot be prosecuted twice for the same offense. But under the dual-sovereignty doctrine, the Double Jeopardy Clause does not bar successive prosecutions if they are brought by separate sovereigns. See, *e. g.*, *United States* v. *Lanza*, 260 U. S. 377, 382. Yet "sovereignty" in this context does not bear its ordinary meaning. This Court does not examine the extent of control that one prosecuting entity wields over the other, the degree to which an entity exercises self-governance, or a government's more particular ability to enact and enforce its own criminal laws. Rather, the test hinges on a single criterion: the "ultimate source" of the power undergirding the respective prosecutions. *United States* v. *Wheeler*, 435 U. S. 313, 320. If two entities derive their power to punish from independent sources, then they may bring successive prosecutions. Conversely, if those entities draw their power from the same ultimate source, then they may not.

Under that approach, the States are separate sovereigns from the Federal Government and from one another. Because States rely on "authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment," state prosecutions have their roots in an "inherent sovereignty" unconnected to the U. S. Congress. *Heath* v. *Alabama*, 474 U. S. 82, 89. For similar reasons, Indian tribes also count as separate sovereigns. A tribe's power to punish pre-existed the Union, and so a tribal prosecution, like a State's, is "attributable in no way to any delegation . . . of federal authority." *Wheeler*, 435 U. S., at 328. Conversely, a municipality cannot count as a sovereign distinct from a State, because it receives its power, in the first instance, from the State. See, *e. g.*, *Waller* v. *Florida*, 397 U. S. 387, 395. And most pertinent here, this Court concluded in the early 20th century that U. S. territories—including an earlier incarnation of Puerto Rico itself—are not sovereigns distinct from the United States. *Grafton* v. *United States*, 206 U. S. 333. The Court reasoned that "the territorial and federal laws [were] creations emanating from the same sovereignty," *Puerto Rico* v. *Shell Co. (P. R.), Ltd.*, 302 U. S. 253, 264, and so federal and territorial prosecutors do not derive their powers from independent sources of authority. Pp. 66–72.

(b) The *Grafton* and *Shell Co.* decisions, in and of themselves, do not control here. In the mid-20th century, Puerto Rico became a new kind of political entity, still closely associated with the United States but governed in accordance with, and exercising self-rule through, a popularly ratified constitution. The magnitude of that change requires consideration of the dual-sovereignty question anew. Yet the result reached, given the historical test applied, ends up the same. Going back as far as the doctrine demands—to the "ultimate source" of Puerto Rico's prosecutorial power—reveals, once again, the U. S. Congress. *Wheeler*, 435 U. S., at 320. Pp. 73–78.

(1) In 1950, Congress enacted Public Law 600, which authorized the people of Puerto Rico to organize a government pursuant to a constitution of their own adoption. The Puerto Rican people capitalized on that opportunity, calling a constitutional convention and overwhelmingly approving the charter it drafted. Once Congress approved that proposal—subject to several important conditions accepted by the convention—the Commonwealth of Puerto Rico, a new political entity, came into being.

Those constitutional developments were of great significance—and, indeed, made Puerto Rico "sovereign" in one commonly understood sense of that term. At that point, Congress granted Puerto Rico a degree of autonomy comparable to that possessed by the States. If the dual-sovereignty doctrine hinged on measuring an entity's self-governance, the emergence of the Commonwealth would have resulted as well in the capacity to bring the kind of successive prosecutions attempted here. Pp. 73–74.

(2) But the dual-sovereignty test focuses not on the fact of self-rule, but on where it first came from. And in identifying a prosecuting entity's wellspring of authority, the Court has insisted on going all the way back—beyond the immediate, or even an intermediate, locus of power to what is termed the "ultimate source." On this settled approach, Puerto Rico cannot benefit from the dual-sovereignty doctrine. True enough, that the Commonwealth's power to enact and enforce criminal law now proceeds, just as petitioner says, from the Puerto Rico Constitution as "ordain[ed] and establish[ed]" by "the people." P. R. Const., Preamble. But back of the Puerto Rican people and their Constitution, the "ultimate" source of prosecutorial power remains the U. S. Congress. Congress, in Public Law 600, authorized Puerto Rico's constitution-making process in the first instance, and Congress, in later legislation, both amended the draft charter and gave it the indispensable stamp of approval. Put simply, Congress conferred the authority to create the Puerto Rico Constitution, which in turn confers the authority to bring criminal charges. That makes Congress the original source of power for Puerto Rico's prosecutors—as it is for the Federal Government's. The island's Constitution, significant though it is, does not break the chain. Pp. 74–78.

Affirmed.

Kagan, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Ginsburg, and Alito, JJ., joined. Ginsburg, J., filed a concurring opinion, in which Thomas, J., joined, *post*, p. 78. Thomas, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 79. Breyer, J., filed a dissenting opinion, in which Sotomayor, J., joined, *post*, p. 80.

Christopher Landau argued the cause for petitioner. With him on the briefs were *César Miranda Rodríguez*, Attorney General of Puerto Rico, *Margarita Mercado Echegaray*, Solicitor General, and *Jason M. Wilcox*.

Adam G. Unikowsky argued the cause for respondents. With him on the brief were *R. Trent McCotter*, *Wanda T. Castro Alemán*, and *Victor A. Meléndez Lugo*.

Nicole A. Saharsky argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Solicitor General Verrilli*, *Assistant Attorney General*

Caldwell, *Deputy Solicitor General Dreeben*, and *Robert A. Parker*.*

JUSTICE KAGAN delivered the opinion of the Court.

The Double Jeopardy Clause of the Fifth Amendment prohibits more than one prosecution for the "same offence." But under what is known as the dual-sovereignty doctrine, a single act gives rise to distinct offenses—and thus may subject a person to successive prosecutions—if it violates the laws of separate sovereigns. To determine whether two prosecuting authorities are different sovereigns for double jeopardy purposes, this Court asks a narrow, historically focused question. The inquiry does not turn, as the term "sovereignty" sometimes suggests, on the degree to which the second entity is autonomous from the first or sets its own political course. Rather, the issue is only whether the prosecutorial powers of the two jurisdictions have independent origins—or, said conversely, whether those powers derive from the same "ultimate source." *United States* v. *Wheeler*, 435 U. S. 313, 320 (1978).

In this case, we must decide if, under that test, Puerto Rico and the United States may successively prosecute a single defendant for the same criminal conduct. We hold they may not, because the oldest roots of Puerto Rico's power to prosecute lie in federal soil.

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*Briefs of *amici curiae* urging affirmance were filed for Colegio de Abrogados y Abrogadas de Puerto Rico et al. by *Brian D. Netter*, *Betty Lugo*, and *Carmen A. Pacheco*; for Current and Former Senior Puerto Rico Officials by *Pratik A. Shah*, *Hyland Hunt*, and *Z. W. Julius Chen*; for the Florida Association of Criminal Defense Lawyers—Miami Chapter by *Howard Srebnick*, *Joshua Shore*, *Terrance G. Reed*, and *A. Margot Moss*; for the Virgin Islands Bar Association by *Dana M. Hrelic*, *Wesley W. Horton*, *Brendon P. Levesque*, *J. Russell B. Pate*, *Edward L. Barry*, and *Joseph A. DiRuzzo III*; and for Christina Duffy Ponsa et al. by *Fred A. Rowley, Jr.*

I

A

Puerto Rico became a territory of the United States in 1898, as a result of the Spanish-American War. The treaty concluding that conflict ceded the island, then a Spanish colony, to the United States, and tasked Congress with determining "[t]he civil rights and political status" of its inhabitants. Treaty of Paris, Art. 9, Dec. 10, 1898, 30 Stat. 1759. In the ensuing hundred-plus years, the United States and Puerto Rico have forged a unique political relationship, built on the island's evolution into a constitutional democracy exercising local self-rule.

Acting pursuant to the U. S. Constitution's Territory Clause, Congress initially established a "civil government" for Puerto Rico possessing significant authority over internal affairs. Organic Act of 1900, ch. 191, 31 Stat. 77; see U. S. Const., Art. IV, § 3, cl. 2 (granting Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"). The U. S. President, with the advice and consent of the Senate, appointed the governor, supreme court, and upper house of the legislature; the Puerto Rican people elected the lower house themselves. See §§ 17–35, 31 Stat. 81–85. Federal statutes generally applied (as they still do) in Puerto Rico, but the newly constituted legislature could enact local laws in much the same way as the then-45 States. See §§ 14–15, 32, *id.*, at 80, 83–84; *Puerto Rico* v. *Shell Co. (P. R.), Ltd.*, 302 U. S. 253, 261 (1937).

Over time, Congress granted Puerto Rico additional autonomy. A federal statute passed in 1917, in addition to giving the island's inhabitants U. S. citizenship, replaced the upper house of the legislature with a popularly elected senate. See Organic Act of Puerto Rico, ch. 145, §§ 5, 26, 39 Stat. 953, 958. And in 1947, an amendment to that law empowered the Puerto Rican people to elect their own governor, a right never before accorded in a U. S. territory. See Act of Aug. 5, 1947, ch. 490, § 1, 61 Stat. 770.

Three years later, Congress enabled Puerto Rico to embark on the project of constitutional self-governance. Public Law 600, "recognizing the principle of government by consent," authorized the island's people to "organize a government pursuant to a constitution of their own adoption." Act of July 3, 1950, § 1, 64 Stat. 319. Describing itself as "in the nature of a compact," the statute submitted its own terms to an up-or-down referendum of Puerto Rico's voters. *Ibid.* According to those terms, the eventual constitution had to "provide a republican form of government" and "include a bill of rights"; all else would be hashed out in a constitutional convention. § 2, *ibid.* The people of Puerto Rico would be the first to decide, in still another referendum, whether to adopt that convention's proposed charter. See § 3, *ibid.* But Congress would cast the dispositive vote: The constitution, Public Law 600 declared, would become effective only "[u]pon approval by the Congress." *Ibid.*

Thus began two years of constitution-making for the island. The Puerto Rican people first voted to accept Public Law 600, thereby triggering a constitutional convention. And once that body completed its work, the island's voters ratified the draft constitution. Congress then took its turn on the document: Before giving its approval, Congress removed a provision recognizing various social welfare rights (including entitlements to food, housing, medical care, and employment); added a sentence prohibiting certain constitutional amendments, including any that would restore the welfare-rights section; and inserted language guaranteeing children's freedom to attend private schools. See Act of July 3, 1952, 66 Stat. 327; Draft Constitution of the Commonwealth of Puerto Rico (1952), in Documents on the Constitutional Relationship of Puerto Rico and the United States 199 (M. Ramirez Lavandero ed., 3d ed. 1988). Finally, the constitution became law, in the manner Congress had specified, when the convention formally accepted those conditions and the Governor "issue[d] a proclamation to that effect." Ch. 567, 66 Stat. 328.

The Puerto Rico Constitution created a new political entity, the Commonwealth of Puerto Rico—or, in Spanish, Estado Libre Asociado de Puerto Rico. See P. R. Const., Art. I, § 1. Like the U. S. Constitution, it divides political power into three branches—the "legislative, judicial and executive." Art. I, § 2. And again resonant of American founding principles, the Puerto Rico Constitution describes that tripartite government as "republican in form" and "subordinate to the sovereignty of the people of Puerto Rico." *Ibid.* The Commonwealth's power, the Constitution proclaims, "emanates from the people and shall be exercised in accordance with their will, within the terms of the compact agreed upon between the people of Puerto Rico and the United States." Art. I, § 1.

B

We now leave the lofty sphere of constitutionalism for the grittier precincts of criminal law. Respondents Luis Sánchez Valle and Jaime Gómez Vázquez (on separate occasions) each sold a gun to an undercover police officer. Commonwealth prosecutors indicted them for, among other things, selling a firearm without a permit in violation of the Puerto Rico Arms Act of 2000. See 25 Laws P. R. Ann. § 458 (2008). While those charges were pending, federal grand juries indicted Sánchez Valle and Gómez Vázquez, based on the same transactions, for violations of analogous U. S. gun trafficking statutes. See 18 U. S. C. §§ 922(a)(1)(A), 923(a), 924(a)(1)(D), 924(a)(2). Both defendants pleaded guilty to those federal charges.

Following their pleas, Sánchez Valle and Gómez Vázquez moved to dismiss the pending Commonwealth charges on double jeopardy grounds. The prosecutors in both cases opposed those motions, arguing that Puerto Rico and the United States are different sovereigns for double jeopardy purposes, and so could bring successive prosecutions against each of the two defendants. The trial courts rejected that view and dismissed the charges. See App. to Pet. for Cert. 307a–352a. But the Puerto Rico Court of Appeals, after consolidating the two cases, reversed those decisions. See *id.*, at 243a–306a.

The Supreme Court of Puerto Rico granted review and held that Puerto Rico's gun sale prosecutions violated the Double Jeopardy Clause. See *id.*, at 1a–70a. The majority reasoned that, under this Court's dual-sovereignty doctrine, "what is crucial" is "[t]he ultimate source" of Puerto Rico's power to prosecute. *Id.*, at 19a; see *id.*, at 20a ("The use of the word 'sovereignty' in other contexts and for other purposes is irrelevant"). Because that power originally "derived from the United States Congress"—*i. e.*, the same source on which federal prosecutors rely—the Commonwealth could not retry Sánchez Valle and Gómez Vázquez for unlawfully selling firearms. *Id.*, at 66a. Three justices disagreed, believing that the Commonwealth and the United States are separate sovereigns. See *id.*, at 71a–242a.

We granted certiorari, 576 U. S. 1095 (2015), to determine whether the Double Jeopardy Clause bars the Federal Government and Puerto Rico from successively prosecuting a defendant on like charges for the same conduct. We hold that it does, and so affirm.

II

A

This case involves the dual-sovereignty carve-out from the Double Jeopardy Clause. The ordinary rule under that Clause is that a person cannot be prosecuted twice for the same offense. See U. S. Const., Amdt. 5 ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb").[1] But two prosecutions, this Court has

[1] Because the parties in this case agree that the Double Jeopardy Clause applies to Puerto Rico, we have no occasion to consider that question here. See Brief for Petitioner 19–21; Brief for Respondents 20, n. 4; see also Brief for United States as *Amicus Curiae* 10, n. 1 (concurring).

long held, are not for the same offense if brought by different sovereigns—even when those actions target the identical criminal conduct through equivalent criminal laws. See, *e. g., United States* v. *Lanza*, 260 U. S. 377, 382 (1922). As we have put the point: "[W]hen the same act transgresses the laws of two sovereigns, it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences." *Heath* v. *Alabama*, 474 U. S. 82, 88 (1985) (internal quotation marks omitted). The Double Jeopardy Clause thus drops out of the picture when the "entities that seek successively to prosecute a defendant for the same course of conduct [are] separate sovereigns." *Ibid.*

Truth be told, however, "sovereignty" in this context does not bear its ordinary meaning. For whatever reason, the test we have devised to decide whether two governments are distinct for double jeopardy purposes overtly disregards common indicia of sovereignty. Under that standard, we do not examine the "extent of control" that "one prosecuting authority [wields] over the other." *Wheeler*, 435 U. S., at 320. The degree to which an entity exercises self-governance—whether autonomously managing its own affairs or continually submitting to outside direction—plays no role in the analysis. See *Shell Co.*, 302 U. S., at 261–262, 264–266. Nor do we care about a government's more particular ability to enact and enforce its own criminal laws. See *Waller* v. *Florida*, 397 U. S. 387, 391–395 (1970). In short, the inquiry (despite its label) does not probe whether a government possesses the usual attributes, or acts in the common manner, of a sovereign entity.[2]

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[2] The dissent, ignoring our longstanding precedent to the contrary, see *supra* this page; *infra*, at 68–72, advances an approach of just this stripe: Its seven considerations all go to the question whether the Commonwealth, by virtue of Public Law 600, gained "the sovereign authority to enact and enforce" its own criminal laws. *Post*, at 84 (opinion of Breyer, J.). Our disagreement with the dissent arises entirely from its use of this test. If

Rather, as Puerto Rico itself acknowledges, our test hinges on a single criterion: the "ultimate source" of the power undergirding the respective prosecutions. *Wheeler*, 435 U. S., at 320; see Brief for Petitioner 26. Whether two prosecuting entities are dual sovereigns in the double jeopardy context, we have stated, depends on "whether [they] draw their authority to punish the offender from distinct sources of power." *Heath*, 474 U. S., at 88. The inquiry is thus historical, not functional—looking at the deepest wellsprings, not the current exercise, of prosecutorial authority. If two entities derive their power to punish from wholly independent sources (imagine here a pair of parallel lines), then they may bring successive prosecutions. Conversely, if those entities draw their power from the same ultimate source (imagine now two lines emerging from a common point, even if later diverging), then they may not.[3]

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the question is whether, after the events of 1950–1952, Puerto Rico had authority to enact and enforce its own criminal laws (or, slightly differently phrased, whether Congress then decided that it should have such autonomy), the answer (all can and do agree) is yes. See *infra*, at 74. But as we now show, that is not the inquiry our double jeopardy law has made relevant: To the contrary, we have rejected that approach again and again—and so reached results inconsistent with its use. See, *e. g., Heath* v. *Alabama*, 474 U. S. 82, 88–91 (1985); *Waller* v. *Florida*, 397 U. S. 387, 391–395 (1970); see *infra* this page and 69–72.

[3] The Court has never explained its reasons for adopting this historical approach to the dual-sovereignty doctrine. It may appear counterintuitive, even legalistic, as compared to an inquiry focused on a governmental entity's functional autonomy. But that alternative would raise serious problems of application. It would require deciding exactly how much autonomy is sufficient for separate sovereignty and whether a given entity's exercise of self-rule exceeds that level. The results, we suspect, would often be uncertain, introducing error and inconsistency into our double jeopardy law. By contrast, as we go on to show, the Court has easily applied the "ultimate source" test to classify broad classes of governments as either sovereign or not for purposes of barring retrials. See *infra*, at 69–72.

Under that approach, the States are separate sovereigns from the Federal Government (and from one another). See *Abbate* v. *United States*, 359 U. S. 187, 195 (1959); *Bartkus* v. *Illinois*, 359 U. S. 121, 132–137 (1959); *Heath*, 474 U. S., at 88. The States' "powers to undertake criminal prosecutions," we have explained, do not "derive[ ] . . . from the Federal Government." *Id.*, at 89. Instead, the States rely on "authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment." *Ibid.*; see U. S. Const., Amdt. 10 ("The powers not delegated to the United States by the Constitution . . . are reserved to the States"); *Blatchford* v. *Native Village of Noatak*, 501 U. S. 775, 779 (1991) (noting that the States "entered the [Union] with their sovereignty intact"). Said otherwise: Prior to forming the Union, the States possessed "separate and independent sources of power and authority," which they continue to draw upon in enacting and enforcing criminal laws. *Heath*, 474 U. S., at 89. State prosecutions therefore have their most ancient roots in an "inherent sovereignty" unconnected to, and indeed pre-existing, the U. S. Congress. *Ibid.*[4]

[4] Literalists might object that only the original 13 States can claim such an independent source of authority; for the other 37, Congress played some role in establishing them as territories, authorizing or approving their constitutions, or (at the least) admitting them to the Union. See U. S. Const., Art. IV, § 3, cl. 1 ("New States may be admitted by the Congress into this Union"). And indeed, that is the tack the dissent takes. See *post*, at 82 (claiming that for this reason the Federal Government is "the 'source' of [later-admitted] States' legislative powers"). But this Court long ago made clear that a new State, upon entry, necessarily becomes vested with all the legal characteristics and capabilities of the first 13. See *Coyle* v. *Smith*, 221 U. S. 559, 566 (1911) (noting that the very meaning of " 'a State' is found in the powers possessed by the original States which adopted the Constitution"). That principle of "equal footing," we have held, is essential to ensure that the nation remains "a union of States [alike] in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States." *Id.*, at 567; see

For similar reasons, Indian tribes also count as separate sovereigns under the Double Jeopardy Clause. Originally, this Court has noted, "the tribes were self-governing sovereign political communities," possessing (among other capacities) the "inherent power to prescribe laws for their members and to punish infractions of those laws." *Wheeler*, 435 U. S., at 322–323. After the formation of the United States, the tribes became "domestic dependent nations," subject to plenary control by Congress—so hardly "sovereign" in one common sense. *United States* v. *Lara*, 541 U. S. 193, 204 (2004) (quoting *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17 (1831)); see *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 56 (1978) ("Congress has plenary authority to limit, modify or eliminate the [tribes'] powers of local self-government"). But unless and until Congress withdraws a tribal power—including the power to prosecute—the Indian community retains that authority in its earliest form. See *Wheeler*, 435 U. S., at 323. The "ultimate source" of a tribe's "power to punish tribal offenders" thus lies in its "primeval" or, at any rate, "pre-existing" sovereignty: A tribal prosecution, like a State's, is "attributable in no way to any delegation . . . of federal authority." *Id.*, at 320, 322, 328; *Santa Clara Pueblo*, 436 U. S., at 56. And that alone is what matters for the double jeopardy inquiry.

Northwest Austin Municipal Util. Dist. No. One v. *Holder*, 557 U. S. 193, 203 (2009) (referring to the "fundamental principle of equal sovereignty" among the States). Thus, each later-admitted State exercises its authority to enact and enforce criminal laws by virtue not of congressional grace, but of the independent powers that its earliest counterparts both brought to the Union and chose to maintain. See *Coyle*, 221 U. S., at 573 ("[W]hen a new State is admitted into the Union, it is so admitted with all the powers of sovereignty and jurisdiction which pertain to the original States"). The dissent's contrary view—that, say, Texas's or California's powers (including the power to make and enforce criminal law) derive from the Federal Government—contradicts the most fundamental conceptual premises of our constitutional order, indeed the very bedrock of our Union.

Conversely, this Court has held that a municipality cannot qualify as a sovereign distinct from a State—no matter how much autonomy over criminal punishment the city maintains. See *Waller*, 397 U. S., at 395. Florida law, we recognized in our pivotal case on the subject, treated a municipality as a "separate sovereign entit[y]" for all relevant real-world purposes: The city possessed broad home-rule authority, including the power to enact criminal ordinances and prosecute offenses. *Id.*, at 391. But that functional control was not enough to escape the double jeopardy bar; indeed, it was wholly beside the point. The crucial legal inquiry was backward-looking: Did the city and State ultimately "derive their powers to prosecute from independent sources of authority"? *Heath*, 474 U. S., at 90 (describing *Waller*'s reasoning). Because the municipality, in the first instance, had received its power from the State, those two entities could not bring successive prosecutions for a like offense.

And most pertinent here, this Court concluded in the early decades of the last century that U. S. territories—including an earlier incarnation of Puerto Rico itself—are not sovereigns distinct from the United States. In *Grafton* v. *United States*, 206 U. S. 333, 355 (1907), we held that the Philippine Islands (then a U. S. territory, also acquired in the Spanish-American War) could not prosecute a defendant for murder after a federal tribunal had acquitted him of the same crime. We reasoned that whereas "a State does not derive its powers from the United States," a territory does: The Philippine courts "exert[ed] all their powers by authority of" the Federal Government. *Id.*, at 354. And then, in *Shell Co.*, we stated that "[t]he situation [in Puerto Rico] was, in all essentials, the same." 302 U. S., at 265. Commenting on a Puerto Rican statute that overlapped with a federal law, we explained that this "legislative duplication [gave] rise to no danger of a second prosecution" because "the territorial and federal laws [were] creations emanating from the same sovereignty." *Id.*, at 264; see also *Heath*, 474 U. S., at 90 (noting that federal and territorial prosecutors "d[o] not derive their powers to prosecute from independent sources of authority").[5]

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[5] The dissent's theory, see *supra*, at 67, n. 2, cannot explain any of these (many) decisions, whether involving States, Indian tribes, cities, or territories. We have already addressed the dissent's misunderstanding with respect to the States, including the later-admitted ones. See *supra*, at 69, and n. 4. This Court's reasoning could not have been plainer: The States (*all* of them) are separate sovereigns for double jeopardy purposes not (as the dissent claims) because they exercise authority over criminal law, but instead because that power derives from a source independent of the Federal Government. See *Heath*, 474 U. S., at 89. So too for the tribes, see *supra*, at 70; and, indeed, here the dissent's contrary reasoning is deeply disturbing. According to the dissent, Congress is in fact "the 'source' of the Indian tribes' criminal-enforcement power" because it has elected not to disturb the exercise of that authority. *Post*, at 84. But beginning with Chief Justice Marshall and continuing for nearly two centuries, this Court has held firm and fast to the view that Congress's power over Indian affairs does nothing to gainsay the profound importance of the tribes' pre-existing sovereignty. See *Worcester* v. *Georgia*, 6 Pet. 515, 559–561 (1832); *Talton* v. *Mayes*, 163 U. S. 376, 384 (1896); *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 788 (2014). And once again, we have stated in no uncertain terms that the tribes are separate sovereigns precisely because of that inherent authority. See *Wheeler*, 435 U. S., at 328. Next, the dissent cannot (and does not even try to) explain our rule that a municipality is not a separate sovereign from a State. See *supra*, at 71. As this Court has explicitly recognized, many cities have (in the words of the dissent's test) wide-ranging "authority to enact and enforce [their] own criminal laws," *post*, at 84; still, they cannot undertake successive prosecutions—because they received that power from state governments, see *Waller*, 397 U. S., at 395. And likewise (finally), the dissent fails to face up to our decisions that the territories are not distinct sovereigns from the United States because the powers they exercise are delegations from Congress. See *Grafton* v. *United States*, 206 U. S. 333, 355 (1907); *supra*, at 71 and this page. That, of course, is what makes them different from the current Philippines, see *post*, at 81, whose relevance here is hard to fathom. As an independent nation, the Philippines wields prosecutorial power that is not traceable to any congressional conferral of authority. And that, to repeat, is what matters: If an entity's capacity to make and enforce criminal law ultimately comes from another government, then the two are not separate sovereigns for double jeopardy purposes.

B

With that background established, we turn to the question presented: Do the prosecutorial powers belonging to Puerto Rico and the Federal Government derive from wholly independent sources? See Brief for Petitioner 26–28 (agreeing with that framing of the issue). If so, the criminal charges at issue here can go forward; but if not, not. In addressing that inquiry, we do not view our decisions in *Grafton* and *Shell Co.* as, in and of themselves, controlling. Following 1952, Puerto Rico became a new kind of political entity, still closely associated with the United States but governed in accordance with, and exercising self-rule through, a popularly ratified constitution. The magnitude of that change requires us to consider the dual-sovereignty question anew. And yet the result we reach, given the legal test we apply, ends up the same. Puerto Rico today has a distinctive, indeed exceptional, status as a self-governing Commonwealth. But our approach is historical. And if we go back as far as our doctrine demands—to the "ultimate source" of Puerto Rico's prosecutorial power, *Wheeler*, 435 U. S., at 320—we once again discover the U. S. Congress.

Recall here the events of the mid-20th century—when Puerto Rico, just as petitioner contends, underwent a profound change in its political system. See Brief for Petitioner 1–2 ("[T]he people of Puerto Rico[ ] engaged in an exercise of popular sovereignty . . . by adopting their *own* Constitution establishing their *own* government to enact their *own* laws"); *supra*, at 64–65. At that time, Congress enacted Public Law 600 to authorize Puerto Rico's adoption of a constitution, designed to replace the federal statute that then structured the island's governance. The people of Puerto Rico capitalized on that opportunity, calling a constitutional convention and overwhelmingly approving the charter it drafted. Once Congress approved that proposal—subject to several important conditions accepted by the convention—the Commonwealth, a new political entity, came into being.

Those constitutional developments were of great significance—and, indeed, made Puerto Rico "sovereign" in one commonly understood sense of that term. As this Court has recognized, Congress in 1952 "relinquished its control over [the Commonwealth's] local affairs[,] grant[ing] Puerto Rico a measure of autonomy comparable to that possessed by the States." *Examining Bd. of Engineers, Architects and Surveyors* v. *Flores de Otero*, 426 U. S. 572, 597 (1976); see *id.*, at 594 ("[T]he purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union"); *Rodriguez* v. *Popular Democratic Party*, 457 U. S. 1, 8 (1982) ("Puerto Rico, like a state, is an autonomous political entity, sovereign over matters not ruled by the [Federal] Constitution" (internal quotation marks omitted)). That newfound authority, including over local criminal laws, brought mutual benefit to the Puerto Rican people and the entire United States. See Brief for United States as *Amicus Curiae* 3. And if our double jeopardy decisions hinged on measuring an entity's self-governance, the emergence of the Commonwealth would have resulted as well in the capacity to bring the kind of successive prosecutions attempted here.

But as already explained, the dual-sovereignty test we have adopted focuses on a different question: not on the fact of self-rule, but on where it came from. See *supra*, at 68–69. We do not care, for example, that the States presently exercise autonomous control over criminal law and other local affairs; instead, we treat them as separate sovereigns because they possessed such control as an original matter, rather than deriving it from the Federal Government. See *supra*, at 69. And in identifying a prosecuting entity's wellspring of authority, we have insisted on going all the way back—beyond the immediate, or even an intermediate, locus of power to what we have termed the "ultimate source." *Wheeler*, 435 U. S., at 320. That is why we have emphasized the "inherent," "primeval," and "pre-existing" capacities of the tribes and States—the power they enjoyed prior to the Union's formation. *Id.*, at 322–323, 328; *Heath*, 474 U. S., at 90; *Santa Clara Pueblo*, 436 U. S., at 56; see *supra*, at 69–70. And it is why cities fail our test even when they enact and enforce their own criminal laws under their own, popularly ratified charters: Because a State must initially authorize any such charter, the State is the furthest-back source of prosecutorial power. See *Waller*, 397 U. S., at 391–394; *supra*, at 71.

On this settled approach, Puerto Rico cannot benefit from our dual-sovereignty doctrine. For starters, no one argues that when the United States gained possession of Puerto Rico, its people possessed independent prosecutorial power, in the way that the States or tribes did upon becoming part of this country. Puerto Rico was until then a colony "under Spanish sovereignty." Treaty of Paris, Art. 2, 30 Stat. 1755. And local prosecutors in the ensuing decades, as petitioner itself acknowledges, exercised only such power as was "delegated by Congress" through federal statutes. Brief for Petitioner 28; see *Shell Co.*, 302 U. S., at 264–265; *supra*, at 71–72. Their authority derived from, rather than pre-existed association with, the Federal Government.

And contrary to petitioner's claim, Puerto Rico's transformative constitutional moment does not lead to a different conclusion. True enough, that the Commonwealth's power to enact and enforce criminal law now proceeds, just as petitioner says, from the Puerto Rico Constitution as "ordain[ed] and establish[ed]" by "the people." P. R. Const., Preamble; see Brief for Petitioner 28–30. But that makes the Puerto Rican populace only the most immediate source of such authority—and that is not what our dual-sovereignty decisions make relevant. Back of the Puerto Rican people and their Constitution, the "ultimate" source of prosecutorial power remains the U. S. Congress, just as back of a city's charter lies a state government. *Wheeler*, 435 U. S., at 320. Congress, in Public Law 600, authorized Puerto Rico's constitution-making process in the first instance; the people of a territory could not legally have initiated that process on their own. See, *e. g., Simms* v. *Simms*, 175 U. S. 162, 168 (1899). And Congress, in later legislation, both amended the draft charter and gave it the indispensable stamp of approval; popular ratification, however meaningful, could not have turned the convention's handiwork into law.[6] Put simply, Congress conferred the authority to create the Puerto Rico Constitution, which in turn confers the authority to bring criminal charges. That makes Congress the original source of power for Puerto Rico's prosecutors—as it is for the Federal Government's. The island's Constitution, significant though it is, does not break the chain.

Petitioner urges, in support of its different view, that Congress itself recognized the new Constitution as "a democratic manifestation of the [people's] will," Brief for Petitioner 2—but far from disputing that point, we readily acknowledge it to be so. As petitioner notes, Public Law 600 affirmed the "principle of government by consent" and offered the Puerto Rican public a "compact," under which they could "organize a government pursuant to a constitution of their own adoption." § 1, 64 Stat. 319; see Brief for Petitioner 2, 29; *supra*, at 64. And the Constitution that Congress approved, as petitioner again underscores, declares that "[w]e, the people" of Puerto Rico, "create" the Commonwealth—a new political entity, "republican in form," in which the people's will is "sovereign[ ]" over the government. P. R. Const., Preamble

[6] Petitioner's own statements are telling as to the role Congress necessarily played in this constitutional process. See, *e. g.*, Reply Brief 1–2 ("Pursuant to Congress' invitation, and with Congress' consent, the people of Puerto Rico engaged in an exercise of popular sovereignty"); *id.*, at 7 ("The Commonwealth's legal cornerstone is Public Law 600"); Tr. of Oral Arg. 19 (describing the adoption of the Puerto Rico Constitution as "pursuant to the invitation of Congress and with the blessing of Congress").

and Art. I, §§1–2; see Brief for Petitioner 2, 29–30; *supra*, at 65. With that consented-to language, Congress "allow[ed] the people of Puerto Rico," in petitioner's words, to begin a new chapter of democratic self-governance. Reply Brief 20.

All that separates our view from petitioner's is what that congressional recognition means for Puerto Rico's ability to bring successive prosecutions. We agree that Congress has broad latitude to develop innovative approaches to territorial governance, see U. S. Const., Art. IV, §3, cl. 2; that Congress may thus enable a territory's people to make large-scale choices about their own political institutions; and that Congress did exactly that in enacting Public Law 600 and approving the Puerto Rico Constitution—prime examples of what Felix Frankfurter once termed "inventive statesmanship" respecting the island. Memorandum for the Secretary of War, in Hearings on S. 4604 before the Senate Committee on Pacific Islands and Porto Rico, 63d Cong., 2d Sess., 22 (1914); see Reply Brief 18–20. But one power Congress does not have, just in the nature of things: It has no capacity, no magic wand or airbrush, to erase or otherwise rewrite its own foundational role in conferring political authority. Or otherwise said, the delegator cannot make itself any less so—no matter how much authority it opts to hand over. And our dual-sovereignty test makes this historical fact dispositive: If an entity's authority to enact and enforce criminal law ultimately comes from Congress, then it cannot follow a federal prosecution with its own. That is true of Puerto Rico, because Congress authorized and approved its Constitution, from which prosecutorial power now flows. So the Double Jeopardy Clause bars both Puerto Rico and the United States from prosecuting a single person for the same conduct under equivalent criminal laws.

III

Puerto Rico boasts "a relationship to the United States that has no parallel in our history." *Examining Bd.*, 426

U. S., at 596. And since the events of the early 1950's, an integral aspect of that association has been the Commonwealth's wide-ranging self-rule, exercised under its own Constitution. As a result of that charter, Puerto Rico today can avail itself of a wide variety of futures. But for purposes of the Double Jeopardy Clause, the future is not what matters—and there is no getting away from the past. Because the ultimate source of Puerto Rico's prosecutorial power is the Federal Government—because when we trace that authority all the way back, we arrive at the doorstep of the U. S. Capitol—the Commonwealth and the United States are not separate sovereigns. That means the two governments cannot "twice put" respondents Sánchez Valle and Gómez Vázquez "in jeopardy" for the "same offence." U. S. Const., Amdt. 5. We accordingly affirm the judgment of the Supreme Court of Puerto Rico.

It is so ordered.

JUSTICE GINSBURG, with whom JUSTICE THOMAS joins, concurring.

I join in full the Court's opinion, which cogently applies long prevailing doctrine. I write only to flag a larger question that bears fresh examination in an appropriate case. The double jeopardy proscription is intended to shield individuals from the harassment of multiple prosecutions for the same misconduct. *Green* v. *United States*, 355 U. S. 184, 187 (1957). Current "separate sovereigns" doctrine hardly serves that objective. States and Nation are "kindred systems," yet "parts of ONE WHOLE." The Federalist No. 82, p. 245 (J. Hopkins ed., 2d ed. 1802) (reprint 2008). Within that whole is it not "an affront to human dignity," *Abbate* v. *United States*, 359 U. S. 187, 203 (1959) (Black, J., dissenting), "inconsistent with the spirit of [our] Bill of Rights," Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 968 (1959), to try or punish a person twice for the same offense? Several jurists and commentators have suggested that the question should be answered with a resounding yes: Ordinarily, a final judgment in a criminal case, just as a final judgment in a civil case, should preclude renewal of the fray any place in the Nation. See *Bartkus* v. *Illinois*, 359 U. S. 121, 150 (1959) (Black, J., dissenting); *United States* v. *All Assets of G. P. S. Automotive Corp.*, 66 F. 3d 483 (CA2 1995) (Calabresi, J.); Franck, An International Lawyer Looks at the *Bartkus* Rule, 34 N. Y. U. L. Rev. 1096 (1959); Grant, Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons, 4 UCLA L. Rev. 1 (1956); Grant, The *Lanza* Rule of Successive Prosecutions, 32 Colum. L. Rev. 1309 (1932). See also 6 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 25.5(a), p. 851 (4th ed. 2015) ("Criticism of *Abbate*['s separate sovereign exception] intensified after the Supreme Court held that the Double Jeopardy Clause of the Fifth Amendment was also applicable to the states . . . ." (citing, *inter alia*, Braun, Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism, 20 Am. J. Crim. L. 1 (1992))). The matter warrants attention in a future case in which a defendant faces successive prosecutions by parts of the whole USA.

Justice Thomas, concurring in part and concurring in the judgment.

The Court today concludes that the Commonwealth of Puerto Rico and the United States are not separate sovereigns because the Federal Government is the ultimate source of Puerto Rico's authority to prosecute crimes. *Ante*, at 76. I agree with that holding, which hews to the Court's precedents concerning the Double Jeopardy Clause and U. S. Territories. But I continue to have concerns about our precedents regarding Indian law, see *United States* v. *Lara*, 541 U. S. 193, 214–226 (2004) (opinion concurring in judgment), and I cannot join the portions of the opinion concerning the application of the Double Jeopardy Clause to successive prosecutions involving Indian tribes. Aside from this caveat, I join the Court's opinion.

JUSTICE BREYER, with whom JUSTICE SOTOMAYOR joins, dissenting.

I agree with the Court that this case poses a special, not a general, question about Puerto Rico's sovereignty. It asks whether "the prosecutorial powers belonging to Puerto Rico and the Federal Government derive from wholly independent sources." *Ante*, at 73. I do not agree, however, with the majority's answer to that question. I do not believe that "if we go back [through history] as far as our doctrine demands" (*i. e.*, "all the way back" to the "furthest-back source of prosecutorial power"), we will "discover" that Puerto Rico and the Federal Government share the same source of power, namely, "the U. S. Congress." *Ante*, at 73, 74–75. My reasons for disagreeing with the majority are in part conceptual and in part historical.

I

Conceptually speaking, the Court does not mean literally that to find the "source" of an entity's criminal law, we must seek the "*furthest-back* source of . . . power." *Ante*, at 75 (emphasis added). We do not trace Puerto Rico's source of power back to Spain or to Rome or to Justinian, nor do we trace the Federal Government's source of power back to the English Parliament or to William the Conqueror or to King Arthur. Rather the Court's statement means that we should trace the source of power back to a time when a previously nonexistent entity, or a previously dependent entity, became independent—at least, sufficiently independent to be considered "sovereign" for purposes of the Double Jeopardy Clause.

As so viewed, this approach explains the Court's decisions fairly well. The Federal Government became an independent entity when the Constitution first took effect. That document gave to the Federal Government the authority to enact criminal laws. And the Congress that the document created is consequently the source of those laws. The original 13 States, once dependents of Britain, became independent entities perhaps at the time of the Declaration of Independence, perhaps at the signing of the Treaty of Paris, perhaps with the creation of the Articles of Confederation. (I need not be precise.) See G. Wood, Creation of the American Republic 1776–1787, p. 354 (1969) ("The problem of sovereignty was not solved by the Declaration of Independence. It continued to be the most important theoretical question of politics throughout the following decade"). And an independent colony's legislation-creating system is consequently the source of those original State's criminal laws.

But the "source" question becomes more difficult with respect to other entities because Congress had an active role to play with respect to their creation (and thus congressional activity appears to be highly relevant to the double jeopardy question). Consider the Philippines. No one could doubt the Philippines' current possession of sovereign authority to enact criminal laws. Yet if we trace that power back through history, we must find the "furthest-back" source of the islands' lawmaking authority, not in any longstanding independent Philippine institutions (for until 1946 the Philippines was dependent, not independent), but in a decision by Congress and the President (as well as by the Philippines) to change the Philippines' status to one of independence. In 1934 Congress authorized the President to "withdraw and surrender all right of . . . sovereignty" over the Philippines. 48 Stat. 463, codified at 22 U. S. C. § 1394. That authorization culminated in the Treaty of Manila, signed in 1946 and approved by Congress that same year, which formally recognized the Philippines as an independent, self-governing nation-state. See 61 Stat. 1174. In any obvious sense of the term, then, the "source" of the Philippines' independence (and its ability to enact and enforce its own criminal laws) was the U. S. Congress.

The same is true for most of the States. In the usual course, a U. S. Territory becomes a State within our Union at the invitation of Congress. In fact, the parallels between admission of new States and the creation of the Commonwealth in this case are significant. Congress passes a law allowing "the inhabitants of the territory . . . to form for themselves a constitution and state government, and to assume such name as they shall deem proper." Act of Apr. 16, 1818, ch. 67, 3 Stat. 428–429 (Illinois); see also Act of June 20, 1910, ch. 310, 36 Stat. 557 (New Mexico) ("[T]he qualified electors of the Territory . . . are hereby authorized to vote for and choose delegates to form a constitutional convention for said Territory for the purpose of framing a constitution for the proposed State of New Mexico"). And after the Territory develops and proposes a constitution, Congress and the President review and approve it before allowing the Territory to become a full-fledged State. See, *e. g.,* Res. 1, 3 Stat. 536 (Illinois); Pub. Res. 8, 37 Stat. 39 (New Mexico); Presidential Proclamation No. 62, 37 Stat. 1723 ("I WILLIAM HOWARD TAFT, . . . declare and proclaim the fact that the fundamental conditions imposed by Congress on the State of New Mexico to entitle that State to admission have been ratified and accepted"). The Federal Government thus is in an important sense the "source" of these States' legislative powers.

One might argue, as this Court has argued, that the source of new States' sovereign authority to enact criminal laws lies in the Constitution's equal-footing doctrine—the doctrine under which the Constitution treats new States the same as it does the original 13. See *ante,* at 69, n. 4. It is difficult, however, to characterize a constitutional insistence upon equality of the States as (in any here relevant sense) the "*source*" of those States' independent legislative powers. For one thing, the equal-footing doctrine is a requirement imposed by the U. S. Constitution. See *Coyle* v. *Smith,* 221 U. S. 559, 566–567 (1911). For that reason, the *Constitution* is ultimately the source of even these new States' equal powers (just as it is the source of Congress' powers). This is not to suggest that we are not a " 'union of States [alike] in power, dignity and authority.' " *Ante,* at 69, n. 4 (quoting *Coyle*, *supra*, at 567). Of course I recognize that we are. It is merely to ask: Without the Constitution (*i. e.*, a *federal* "source"), what claim would new States have to a lawmaking power equal to that of their "earliest counterparts"? *Ante*, at 70, n. 4.

For another thing, the equal-footing doctrine means that, going forward, new States must enjoy the same rights and obligations as the original States—they are, for example, equally restricted by the First Amendment and equally "competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." *Coyle*, *supra*, at 567. But this current and future equality does not destroy the fact that there is a federal "source" from which those rights and obligations spring: the Congress which agreed to admit those new States into the Union in accordance with the Constitution's terms. See, *e. g.*, 37 Stat. 39 ("The Territor[y] of New Mexico [is] hereby admitted into the Union upon an equal footing with the original States").

In respect to the Indian tribes, too, congressional action is relevant to the double jeopardy analysis. This Court has explained that the tribes possess an independent authority to enact criminal laws by tracing the source of power back to a time of " 'primeval' " tribal existence when " 'the tribes were self-governing sovereign political communities.' " *Ante*, at 70 (quoting *United States* v. *Wheeler*, 435 U. S. 313, 322–323 (1978)). But as the Court today recognizes, this prelapsarian independence must be read in light of congressional action—or, as it were, inaction. That is because—whatever a tribe's history—Congress maintains "plenary authority to limit, modify or eliminate the [tribes'] powers of local self-government," *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 56 (1978), and thus the tribes remain sovereign for purposes of the Double Jeopardy Clause only "until" Congress chooses to withdraw that power, *ante*, at 70. In this sense, Congress' pattern of inaction (*i. e.*, its choice to refrain from withdrawing dual sovereignty) amounts to an implicit decision to *grant* such sovereignty to the tribes. Is not Congress then, in this way, the "source" of the Indian tribes' criminal-enforcement power?

These examples illustrate the complexity of the question before us. I do not believe, as the majority seems to believe, that the double jeopardy question can be answered simply by tracing Puerto Rico's current legislative powers back to Congress' enactment of Public Law 600 and calling the Congress that enacted that law the "source" of the island's criminal-enforcement authority. That is because—as with the Philippines, new States, and the Indian tribes—congressional activity and other historic circumstances can combine to establish a *new* source of power. We therefore must consider Public Law 600 in the broader context of Puerto Rico's history. Only through that lens can we decide whether the Commonwealth, between the years 1950 and 1952, gained sufficient sovereign authority to become the "source" of power behind its own criminal laws.

II

The Treaty of Paris, signed with Spain in 1898, said that "[t]he civil rights and political status" of Puerto Rico's "inhabitants . . . shall be determined by the Congress." Art. 9, 30 Stat. 1759. In my view, Congress, in enacting the Puerto Rican Federal Relations Act (*i. e.*, Public Law 600), determined that the "political status" of Puerto Rico would for double jeopardy purposes subsequently encompass the sovereign authority to enact and enforce—pursuant to its *own* powers—its own criminal laws. Several considerations support this conclusion.

First, the timing of Public Law 600's enactment suggests that Congress intended it to work a significant change in the nature of Puerto Rico's political status. Prior to 1950 Puerto Rico was initially subject to the Foraker Act, which provided the Federal Government with virtually complete control of the island's affairs. In 1917 Puerto Rico became subject to the Jones Act, which provided for United States citizenship and permitted Puerto Ricans to elect local legislators but required submission of local laws to Congress for approval. In 1945 the United States, when signing the United Nations Charter, promised change. It told the world that it would "develop self-government" in its Territories. Art. 73(b), June 26, 1945, 59 Stat. 1048, T. S. No. 993 (U. N. Charter). And contemporary observers referred to Public Law 600 as taking a significant step in the direction of change by granting Puerto Rico a special status carrying with it considerable autonomy. See, *e. g.,* Magruder, The Commonwealth Status of Puerto Rico, 15 U. Pitt. L. Rev. 1, 14–16 (1953); see also L. Kalman, Abe Fortas: A Biography 170–171 (1990) ("[After the 1950 'compact,'] Puerto Rico was self-ruling, according to [Fortas], although the federal government retained the same power it would have over states in a union").

Second, Public Law 600 uses language that says or implies a significant shift in the legitimacy-conferring source of many local laws. The Act points out that the United States "has progressively recognized the right of self-government of the people of Puerto Rico." 64 Stat. 319. It "[f]ully recogniz[es] the principle of government by consent." 48 U. S. C. § 731b. It describes itself as being "in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption." *Ibid.* It specifies that the island's new constitution must "provide a republican form of government," § 731c; and this Court has characterized that form of government as including "the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves," *In re Duncan*, 139 U. S. 449, 461 (1891).

Third, Public Law 600 created a constitution-writing process that led Puerto Rico to convene a constitutional convention and to write a constitution that, in assuring Puerto Rico independent authority to enact many local laws, specifies that the legitimacy-conferring source of much local lawmaking shall henceforth be the "people of Puerto Rico." The Constitution begins by stating:

> "We, the people of Puerto Rico, in order to organize ourselves politically on a fully democratic basis, to promote the general welfare, and to secure for ourselves and our posterity the complete enjoyment of human rights, placing our trust in Almighty God, do ordain and establish this Constitution for the commonwealth . . . .
>
> . . . . .
>
> "We understand that the democratic system of government is one in which the will of the people is the source of public power." P. R. Const., Preamble (1952).

The Constitution adds that the Commonwealth's "political power emanates from the people and shall be exercised in accordance with their will," Art. I, § 1; that the "government of the Commonwealth of Puerto Rico shall be republican in form and its legislative, judicial and executive branches . . . shall be equally subordinate to the sovereignty of the people of Puerto Rico," Art. I, § 2; and that "[a]ll criminal actions in the courts of the Commonwealth shall be conducted in the name and by the authority of 'The People of Puerto Rico,'" Art. VI, § 18.

At the same time, the constitutional convention adopted a resolution stating that Puerto Rico should be known officially as "'The Commonwealth of Puerto Rico'" in English and "'El Estado Libre Asociado de Puerto Rico'" in Spanish. Resolution 22, in Documents on the Constitutional Relationship of Puerto Rico and the United States 192 (M. Ramirez

Lavandero ed., 3d ed. 1988). The resolution explained that these names signified "a politically organized community . . . in which political power resides ultimately in the people, hence a free state, but one which is at the same time linked to a broader political system in a federal or other type of association and therefore does not have independent and separate existence." *Id.*, at 191.

Fourth, both Puerto Rico and the United States ratified Puerto Rico's Constitution. Puerto Rico did so initially through a referendum held soon after the Constitution was written and then by a second referendum held after the convention revised the Constitution in minor ways (ways that Congress insisted upon, but which are not relevant here). See 66 Stat. 327; see also *ante*, at 64 (describing these revisions). Congress did so too by enacting further legislation that said that the "constitution of the Commonwealth of Puerto Rico . . . shall become effective when the Constitutional Convention of Puerto Rico shall have declared in a formal resolution its acceptance . . . of the conditions of approval herein contained." 66 Stat. 327–328. And, as I have just said, the convention, having the last word, made the minor amendments and Puerto Rico ratified the Constitution through a second referendum.

Fifth, all three branches of the Federal Government subsequently recognized that Public Law 600, the Puerto Rican Constitution, and related congressional actions granted Puerto Rico considerable autonomy in local matters, sometimes akin to that of a State. See, *e. g.*, S. Rep. No. 1720, 82d Cong., 2d Sess., 6 (1952) ("As regards local matters, the sphere of action and the methods of government bear a resemblance to that of any State of the Union"). Each branch of the Federal Government subsequently took action consistent with that view.

As to the Executive Branch, President Truman wrote to Congress that the Commonwealth's Constitution, when enacted and ratified, "vest[s] in the people of Puerto

Rico" complete "authority and responsibility for local self-government." Public Papers of the Presidents, Apr. 22, 1952, p. 287 (1952–1953). Similarly, President Kennedy in 1961 circulated throughout the Executive Branch a memorandum that said:

> "The Commonwealth structure, and its relationship to the United States which is in the nature of a compact, provide for self-government in respect of internal affairs and administration, subject only to the applicable provisions of the Federal Constitution, the Puerto Rican Federal Relations Act [*i. e.*, Public Law 600], and the acts of Congress authorizing and approving the constitution.
>
> . . . . .
>
> "All departments, agencies, and officials of the executive branch of the Government should faithfully and carefully observe and respect this arrangement in relation to all matters affecting the Commonwealth of Puerto Rico." 26 Fed. Reg. 6695.

Subsequent administrations made similar statements. See Liebowitz, The Application of Federal Law to the Commonwealth of Puerto Rico, 56 Geo. L. J. 219, 233, n. 60 (1967) (citing message from President Johnson).

The Department of State, acting for the President and for the Nation, wrote a memorandum to the United Nations explaining that the United States would no longer submit special reports about the "economic, social, and educational conditions" in Puerto Rico because Puerto Rico was no longer a non-self-governing Territory. U. N. Charter, Art. 73(e) (requiring periodic reports concerning such Territories). Rather, the memorandum explained that Puerto Rico had achieved "the full measure of self-government." Memorandum by the Government of the United States of America Concerning the Cessation of Transmission of Information Under Article 73(e) of the Charter With Regard to the Commonwealth of Puerto Rico, in A. Fernós-Isern, Original Intent in the Constitution of Puerto Rico 154 (2d ed. 2002). The memorandum added that "Congress has agreed that Puerto Rico shall have, under [its] Constitution, freedom from control or interference by the Congress in respect to internal government and administration." *Id.*, at 153.

The United Nations accepted this view of the matter, the General Assembly noting in a resolution that "the people of the Commonwealth of Puerto Rico . . . have achieved a new constitutional status." Resolution 748 VIII, in *id.*, at 142. The General Assembly added that "the people of the Commonwealth of Puerto Rico have been invested with attributes of political sovereignty which clearly identify the status of self-government attained by the Puerto Rican people as that of an autonomous political entity." *Ibid.*; see also United Nations and Decolonization, Trust and Non-Self-Governing Territories (1945–1999) (noting that Puerto Rico underwent a "Change in Status" in 1952, "after which information was no longer submitted to the United Nations" concerning this former "[t]rusteeship"), online at http://www.un.org/en/decolonization/nonselfgov.shtml (as last visited June 3, 2016).

The Department of Justice, too, we add, until this case, argued that Puerto Rico is, for Double Jeopardy Clause purposes, an independently sovereign source of its criminal laws. See, *e. g.*, *United States* v. *Lopez Andino*, 831 F. 2d 1164, 1168 (CA1 1987) (accepting the Government's position that "Puerto Rico is to be treated as a state for purposes of the double jeopardy clause"), cert. denied, 486 U. S. 1034 (1988).

As to the Judicial Branch, this Court has held that Puerto Rico's laws are "state statutes" within the terms of the Three-Judge Court Act. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663 (1974). In doing so, we wrote that the 1952 events had led to "significant changes in Puerto Rico's governmental structure"; that the Commonwealth had been " 'organized as a body politic by the people of Puerto Rico under their own constitution' "; and that these differences distinguish Puerto Rico's laws from those of other Territories, which are " 'subject to congressional regulation.' " *Id.*, at 672–673; see also, *e. g.*, *Examining Bd. of Engineers, Architects and Surveyors* v. *Flores de Otero*, 426 U. S. 572, 597 (1976) (Congress granted Puerto Rico "a measure of autonomy comparable to that possessed by the States"); *Rodriguez* v. *Popular Democratic Party*, 457 U. S. 1, 8 (1982) ("Puerto Rico, like a State, is an autonomous political entity, sovereign over matters not ruled by the [Federal] Constitution" (internal quotation marks omitted)).

Finally, as to the Legislative Branch, to my knowledge since 1950 Congress has never—I repeat, *never*—vetoed or modified a local criminal law enacted in Puerto Rico.

Sixth, Puerto Rico's Supreme Court has consistently held, over a period of more than 50 years, that Puerto Rico's people (and not Congress) are the "source" of Puerto Rico's local criminal laws. See, *e. g.*, *Pueblo* v. *Castro Garcia*, 20 P. R. Offic. Trans. 775, 807–808 (1988) ("Puerto Rico's . . . criminal laws . . . emanate from a different source than the federal laws"); *R. C. A. Communications, Inc.* v. *Government of the Capital*, 91 P. R. R. 404, 415 (1964) (transl.) (Puerto Rico's "governmental powers . . . flow from itself and from its own authority" and are not "merely delegated by Congress"); *Ramirez de Ferrer* v. *Mari Bras*, 144 D. P. R. 141, 158 (Puerto Rico's "governmental powers . . . emanate from the will of the people of Puerto Rico"); see also *Pueblo* v. *Figueroa*, 77 P. R. R. 175, 183 (1954) (finding that it was "impossible to believe that" the Puerto Rican Constitution is "in legal effect" simply "a Federal law"); cf. *Figueroa* v. *Puerto Rico*, 232 F. 2d 615, 620 (CA1 1956) ("[T]he constitution of the Commonwealth is not just another Organic Act of Congress" "though congressional approval was necessary to launch it forth").

Seventh, insofar as Public Law 600 (and related events) grants Puerto Rico local legislative autonomy, it is particularly likely to have done so in respect to local criminal law. That is because Puerto Rico's legal system arises out of, and reflects, not traditional British common law (which underlies the criminal law in 49 of our 50 States), but a tradition stemming from European civil codes and Roman law. In 1979 Chief Justice Trías Monge wrote for a unanimous Puerto Rico Supreme Court that the Commonwealth's laws were to be "governed . . . by the civil law system," with roots in the Spanish legal tradition, not by the "common-law principles" inherent in "'American doctrines and theories'" of the law. *Valle* v. *American Int'l Ins. Co.*, 8 P. R. Offic. Trans. 735, 736–738. Considerations of knowledge, custom, habit, and convention argue with special force for autonomy in the area of criminal law. Cf. *Diaz* v. *Gonzalez*, 261 U. S. 102, 105–106 (1923) (Holmes, J., for the Court) (cautioning that federal courts should not apply "common law conceptions" in Puerto Rico, because the island "inherit[ed]" and was "brought up in a different system from that which prevails here").

I would add that the practices, actions, statements, and attitudes just described are highly relevant here, for this Court has long made clear that, when we face difficult questions of the Constitution's structural requirements, longstanding customs and practices can make a difference. See *NLRB* v. *Noel Canning*, 573 U. S. 513, 525 (2014) ("[I]t is equally true that the longstanding practice of the government can inform our determination of what the law is" (citation and internal quotation marks omitted)); see also, *e. g.*, *Mistretta* v. *United States*, 488 U. S. 361, 401 (1989); *Dames & Moore* v. *Regan*, 453 U. S. 654, 686 (1981); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 610–611 (1952) (Frankfurter, J., concurring); *The Pocket Veto Case*, 279 U. S. 655, 689–690 (1929); *Ex parte Grossman*, 267 U. S. 87, 118–119 (1925); *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 472–474 (1915); *McPherson* v. *Blacker*, 146 U. S. 1, 27 (1892); *McCulloch* v. *Maryland*, 4 Wheat. 316, 401 (1819); *Stuart* v. *Laird*, 1 Cranch 299 (1803). Here, longstanding customs, actions, and attitudes, both in Puerto Rico and on the mainland, uniformly favor Puerto Rico's position (*i. e.*, that it is sovereign—and has been since 1952—for purposes of the Double Jeopardy Clause).

This history of statutes, language, organic acts, traditions, statements, and other actions, taken by all three branches of the Federal Government and by Puerto Rico, convinces me that the United States has entered into a compact one of the terms of which is that the "source" of Puerto Rico's criminal law ceased to be the U. S. Congress and became Puerto Rico itself, its people, and its Constitution. The evidence of that grant of authority is far stronger than the evidence of congressional silence that led this Court to conclude that Indian tribes maintained a similar sovereign authority. Indeed, it is difficult to see how we can conclude that the tribes do possess this authority but Puerto Rico does not. Regardless, for the reasons given, I would hold for Double Jeopardy Clause purposes that the criminal law of Puerto Rico and the criminal law of the Federal Government do not find their legitimacy-conferring origin in the same "source."

I respectfully dissent.

Syllabus

HALO ELECTRONICS, INC. *v.* PULSE ELECTRONICS, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 14–1513. Argued February 23, 2016—Decided June 13, 2016*

Section 284 of the Patent Act provides that, in a case of infringement, courts "may increase the damages up to three times the amount found or assessed." 35 U. S. C. § 284. The Federal Circuit has adopted a two-part test for determining whether damages may be increased pursuant to § 284. First, a patent owner must "show by clear and convincing evidence that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent." *In re Seagate Technology, LLC*, 497 F. 3d 1360, 1371. Second, the patentee must demonstrate, also by clear and convincing evidence, that the risk of infringement "was either known or so obvious that it should have been known to the accused infringer." *Ibid.* Under Federal Circuit precedent, an award of enhanced damages is subject to trifurcated appellate review. The first step of *Seagate*—objective recklessness—is reviewed *de novo*; the second—subjective knowledge—for substantial evidence; and the ultimate decision—whether to award enhanced damages—for abuse of discretion.

In each of these cases, petitioners were denied enhanced damages under the *Seagate* framework.

Held: The *Seagate* test is not consistent with § 284. Pp. 103–110.

(a) The pertinent language of § 284 contains no explicit limit or condition on when enhanced damages are appropriate, and this Court has emphasized that the "word 'may' clearly connotes discretion." *Martin* v. *Franklin Capital Corp.*, 546 U. S. 132, 136. At the same time, however, "[d]iscretion is not whim." *Id.*, at 139. Although there is "no precise rule or formula" for awarding damages under § 284, a district court's "discretion should be exercised in light of the considerations" underlying the grant of that discretion. *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 572 U. S. 545, 554. Here, 180 years of enhanced damages awards under the Patent Act establish that they are not to be meted out in a typical infringement case, but are instead designed as a sanction for egregious infringement behavior. Pp. 103–104.

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*Together with No. 14–1520, *Stryker Corp. et al.* v. *Zimmer, Inc., et al.*, also on certiorari to the same court.

(b) In many respects, the *Seagate* test rightly reflects this historic guidance. It is, however, "unduly rigid, and . . . impermissibly encumbers the statutory grant of discretion to district courts." *Octane Fitness,* 572 U. S., at 553. Pp. 104–108.

(1) By requiring an objective recklessness finding in every case, the *Seagate* test excludes from discretionary punishment many of the most culpable offenders, including the "wanton and malicious pirate" who intentionally infringes a patent—with no doubts about its validity or any notion of a defense—for no purpose other than to steal the patentee's business. *Seymour* v. *McCormick*, 16 How. 480, 488. Under *Seagate,* a district court may not even consider enhanced damages for such a pirate, unless the court first determines that his infringement was "objectively" reckless. In the context of such deliberate wrongdoing, however, it is not clear why an independent showing of objective recklessness should be a prerequisite to enhanced damages. *Octane Fitness* arose in a different context but is instructive here. There, a two-part test for determining when a case was "exceptional"—and therefore eligible for an award of attorney's fees—was rejected because a claim of "subjective bad faith" alone could "warrant a fee award." 572 U. S., at 555. So too here: A patent infringer's subjective willfulness, whether intentional or knowing, may warrant enhanced damages, without regard to whether his infringement was objectively reckless. The *Seagate* test further errs by making dispositive the ability of the infringer to muster a reasonable defense at trial, even if he did not act on the basis of that defense or was even aware of it. Culpability, however, is generally measured against the actor's knowledge at the time of the challenged conduct. In sum, § 284 allows district courts to punish the full range of culpable behavior. In so doing, they should take into account the particular circumstances of each case and reserve punishment for egregious cases typified by willful misconduct. Pp. 104–106.

(2) *Seagate*'s requirement that recklessness be proved by clear and convincing evidence is also inconsistent with § 284. Once again, *Octane Fitness* is instructive. There, a clear and convincing standard for awards of attorney's fees was rejected because the statute at issue supplied no basis for imposing a heightened standard. Here, too, § 284 "imposes no specific evidentiary burden, much less such a high one," 572 U. S., at 557. And the fact that Congress erected a higher standard of proof elsewhere in the Patent Act, but not in § 284, is telling. "[P]atent-infringement litigation has always been governed by a preponderance of the evidence standard." *Ibid.* Enhanced damages are no exception. P. 107.

(3) Having eschewed any rigid formula for awarding enhanced damages under § 284, this Court likewise rejects the Federal Circuit's

tripartite appellate review framework. In *Highmark Inc.* v. *Allcare Health Management System, Inc.*, 572 U. S. 559, the Court built on the *Octane Fitness* holding—which confirmed district court discretion to award attorney's fees—and rejected a similar multipart standard of review in favor of abuse of discretion review. The same conclusion follows naturally from the holding here: Because § 284 "commits the determination" whether enhanced damages are appropriate to the district court's discretion, "that decision is to be reviewed on appeal for abuse of discretion." 572 U. S., at 563. Nearly two centuries of enhanced damages awards have given substance to the notion that district courts' discretion is limited, and the Federal Circuit should review their exercise of that discretion in light of longstanding considerations that have guided both Congress and the courts. Pp. 107–108.

(c) Respondents' additional arguments are unpersuasive. They claim that Congress ratified the *Seagate* test when it reenacted § 284 in 2011 without pertinent change, but the reenacted language unambiguously confirmed discretion in the district courts. Neither isolated snippets of legislative history nor a reference to willfulness in another recently enacted section reflects an endorsement of *Seagate*'s test. Respondents are also concerned that allowing district courts unlimited discretion to award enhanced damages could upset the balance between the protection of patent rights and the interest in technological innovation. That concern—while serious—cannot justify imposing an artificial construct such as the *Seagate* test on the limited discretion conferred under § 284. Pp. 108–109.

No. 14–1513, 769 F. 3d 1371; No. 14–1520, 782 F. 3d 649, vacated and remanded.

Roberts, C. J., delivered the opinion for a unanimous Court. Breyer, J., filed a concurring opinion, in which Kennedy and Alito, JJ., joined, *post*, p. 110.

Jeffrey B. Wall argued the cause for petitioners in both cases. With him on the briefs for petitioners in No. 14–1520 were *Garrard R. Beeney*, *Robert J. Giuffra, Jr.*, *Sharon A. Hwang*, *Deborah A. Laughton*, and *Stephanie F. Samz*. *Craig E. Countryman*, *Michael J. Kane*, *William R. Woodford*, and *John A. Dragseth* filed briefs for petitioner in No. 14–1513.

Roman Martinez argued the cause for the United States as *amicus curiae* urging vacatur. With him on the brief were *Solicitor General Verrilli, Principal Deputy Assistant Attorney General Mizer, Deputy Solicitor General Stewart, Mark R. Freeman, Sarah Harris, Thomas W. Krause,* and *Scott C. Weidenfeller.*

Carter G. Phillips argued the cause for respondents in both cases. With him on the brief for respondents in No. 14–1513 were *Mark L. Hogge, Victor H. Boyajian, Shailendra K. Maheshwari, Charles R. Bruton, Rajesh C. Noronha, Constantine L. Trela, Jr.,* and *Steven J. Horowitz. Seth P. Waxman, Thomas G. Saunders, Jason D. Hirsch, Mark C. Fleming,* and *Donald R. Dunner* filed a brief for respondents in No. 14–1520.†

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†Briefs of *amici curiae* urging reversal in both cases were filed for Innovention Toys, LLC, by *James C. Otteson, David A. Caine,* and *Thomas T. Carmack*; for Nokia Technologies Oy et al. by *John D. Haynes*; and for Small Inventors by *Andrew S. Baluch* and *Robert N. Schmidt.*

Briefs of *amici curiae* urging affirmance in both cases were filed for BSA|The Software Alliance by *Andrew J. Pincus* and *Paul W. Hughes*; for Dell Inc. et al. by *John Thorne, Gregory G. Rapawy, Anthony Peterman,* and *Michele K. Connors*; for EMC Corp. by *Thomas G. Hungar, Matthew D. McGill, Alexander N. Harris, Paul T. Dacier,* and *Thomas A. Brown*; for Google Inc. et al. by *Paul D. Clement*; for Intel Corp. et al. by *Kannon K. Shanmugam, David M. Krinsky,* and *Allison B. Jones*; for Huawei Technologies Co. by *Aaron M. Streett*; for Internet Companies by *Mark A. Lemley, Daralyn J. Durie,* and *Michael A. Feldman*; for Marvell Semiconductor, Inc., by *Kathleen M. Sullivan, Susan Estrich, Michael T. Zeller,* and *Derek L. Shaffer*; for Members of Congress by *Daniel M. Lechleiter, Brian J. Paul, Joel D. Sayres,* and *Aaron D. Van Oort*; and for Yahoo! Inc. et al. by *Jeffrey A. Lamken, Michael G. Pattillo, Jr.,* and *Kevin T. Kramer.*

Briefs of *amici curiae* were filed in both cases for the American Intellectual Property Law Association by *Peter A. Sullivan, Donald R. Ware,* and *Lisa K. Jorgenson*; for Askeladden LLC by *Kevin J. Culligan, William M. Jay,* and *Brian T. Burgess*; for Ericsson Inc. by *Mike McKool, Jr., Joel L. Thollander,* and *John B. Campbell*; for the Intellectual Property Owners Association by *Paul H. Berghoff, Philip S. Johnson,* and *Kevin H. Rhodes*; for Intellectual Property Professors by *Christopher B. Seaman, pro se*; for Licensing Executives Society (U. S. A. and Canada), Inc., by *Daniel S. Stringfield*; for Mentor Graphics Corp. et al. by *John D. Vandenberg*; for Mykey Technology, Inc., by *Robert E. Freitas* and *Jessica*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Section 284 of the Patent Act provides that, in a case of infringement, courts "may increase the damages up to three times the amount found or assessed." 35 U. S. C. § 284. In *In re Seagate Technology, LLC*, 497 F. 3d 1360 (2007) (en banc), the United States Court of Appeals for the Federal Circuit adopted a two-part test for determining when a district court may increase damages pursuant to § 284. Under *Seagate*, a patent owner must first "show by clear and convincing evidence that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent." *Id.*, at 1371. Second, the patentee must demonstrate, again by clear and convincing evidence, that the risk of infringement "was either known or so obvious that it should have been known to the accused infringer." *Ibid.* The question before us is whether this test is consistent with § 284. We hold that it is not.

I

A

Enhanced damages are as old as U. S. patent law. The Patent Act of 1793 mandated treble damages in any successful infringement suit. See § 5, 1 Stat. 322. In the Patent Act of 1836, however, Congress changed course and made enhanced damages discretionary, specifying that "it shall be in the power of the court to render judgment for any sum above the amount found by [the] verdict . . . not exceeding three times the amount thereof, according to the circumstances of the case." § 14, 5 Stat. 123. In construing that new provision, this Court explained that the change was prompted by the "injustice" of subjecting a "defendant who acted in ignorance or good faith" to the same treatment as

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N. Leal; for Public Knowledge et al. by *Charles Duan* and *Daniel Nazer*; and for Adam Mossoff by *Matthew J. Dowd*.

the "wanton and malicious pirate." *Seymour* v. *McCormick*, 16 How. 480, 488 (1854). There "is no good reason," we observed, "why taking a man's property in an invention should be trebly punished, while the measure of damages as to other property is single and actual damages." *Id.*, at 488–489. But "where the injury is wanton or malicious, a jury may inflict vindictive or exemplary damages, not to recompense the plaintiff, but to punish the defendant." *Id.*, at 489.

The Court followed the same approach in other decisions applying the 1836 Act, finding enhanced damages appropriate, for instance, "where the wrong [had] been done, under aggravated circumstances," *Dean* v. *Mason*, 20 How. 198, 203 (1858), but not where the defendant "appeared in truth to be ignorant of the existence of the patent right, and did not intend any infringement," *Hogg* v. *Emerson*, 11 How. 587, 607 (1850). See also *Livingston* v. *Woodworth*, 15 How. 546, 560 (1854) ("no ground" to inflict "penalty" where infringers were not "wanton").

In 1870, Congress amended the Patent Act, but preserved district court discretion to award up to treble damages "according to the circumstances of the case." § 59, 16 Stat. 207. We continued to describe enhanced damages as "vindictive or punitive," which the court may "inflict" when "the circumstances of the case appear to require it." *Tilghman* v. *Proctor*, 125 U. S. 136, 143–144 (1888); *Topliff* v. *Topliff*, 145 U. S. 156, 174 (1892) (infringer knowingly sold copied technology of his former employer). At the same time, we reiterated that there was no basis for increased damages where "[t]here is no pretence of any wanton and wilful breach" and "nothing that suggests punitive damages, or that shows wherein the defendant was damnified other than by the loss of the profits which the plaintiff received." *Cincinnati Siemens-Lungren Gas Illuminating Co.* v. *Western Siemens-Lungren Co.*, 152 U. S. 200, 204 (1894).

Courts of Appeals likewise characterized enhanced damages as justified where the infringer acted deliberately or willfully, see, *e. g.*, *Baseball Display Co.* v. *Star Ballplayer Co.*, 35 F. 2d 1, 3–4 (CA3 1929) (increased damages award appropriate "because of the deliberate and willful infringement"); *Power Specialty Co.* v. *Connecticut Light & Power Co.*, 80 F. 2d 874, 878 (CA2 1936) ("wanton, deliberate, and willful" infringement); *Brown Bag Filling Mach. Co.* v. *Drohen*, 175 F. 576, 577 (CA2 1910) ("a bald case of piracy"), but not where the infringement "was not wanton and deliberate," *Rockwood* v. *General Fire Extinguisher Co.*, 37 F. 2d 62, 66 (CA2 1930), or "conscious and deliberate," *Goodyear Tire & Rubber Co.* v. *Overman Cushion Tire Co.*, 95 F. 2d 978, 986 (CA6 1938).

Some early decisions did suggest that enhanced damages might serve to compensate patentees as well as to punish infringers. See, *e. g.*, *Clark* v. *Wooster*, 119 U. S. 322, 326 (1886) (noting that "[t]here may be damages beyond" licensing fees "but these are more properly the subjects" of enhanced damages awards). Such statements, however, were not for the ages, in part because the merger of law and equity removed certain procedural obstacles to full compensation absent enhancement. See generally 7 Chisum on Patents §20.03[4][b][iii], pp. 20–343 to 20–344 (2011). In the main, moreover, the references to compensation concerned costs attendant to litigation. See *Clark*, 119 U. S., at 326 (identifying enhanced damages as compensation for "the expense and trouble the plaintiff has been put to"); *Day* v. *Woodworth*, 13 How. 363, 372 (1852) (enhanced damages appropriate when defendant was "stubbornly litigious" or "caused unnecessary expense and trouble to the plaintiff"); *Teese* v. *Huntingdon*, 23 How. 2, 8–9 (1860) (discussing enhanced damages in the context of "counsel fees"). That concern dissipated with the enactment in 1952 of 35 U. S. C. §285, which authorized district courts to award reasonable attorney's fees to prevailing parties in "exceptional cases" under the Patent Act. See *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 572 U. S. 545, 553 (2014).

It is against this backdrop that Congress, in the 1952 codification of the Patent Act, enacted § 284. "The stated purpose" of the 1952 revision "was merely reorganization in language to clarify the statement of the statutes." *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U. S. 476, 505, n. 20 (1964) (internal quotation marks omitted). This Court accordingly described § 284—consistent with the history of enhanced damages under the Patent Act—as providing that "punitive or 'increased' damages" could be recovered "in a case of willful or bad-faith infringement." *Id.*, at 508; see also *Dowling* v. *United States*, 473 U. S. 207, 227, n. 19 (1985) ("willful infringement"); *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank*, 527 U. S. 627, 648, n. 11 (1999) (describing § 284 damages as "punitive").

B

In 2007, the Federal Circuit decided *Seagate* and fashioned the test for enhanced damages now before us. Under *Seagate*, a plaintiff seeking enhanced damages must show that the infringement of his patent was "willful." 497 F. 3d, at 1368. The Federal Circuit announced a two-part test to establish such willfulness: First, "a patentee must show by clear and convincing evidence that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent," without regard to "[t]he state of mind of the accused infringer." *Id.*, at 1371. This objectively defined risk is to be "determined by the record developed in the infringement proceedings." *Ibid.* "Objective recklessness will not be found" at this first step if the accused infringer, during the infringement proceedings, "raise[s] a 'substantial question' as to the validity or noninfringement of the patent." *Bard Peripheral Vascular, Inc.* v. *W. L. Gore & Assoc., Inc.*, 776 F. 3d 837, 844 (CA Fed. 2015). That categorical bar applies even if the defendant was unaware of the arguable defense when he acted. See *Seagate*, 497 F. 3d, at 1371; *Spine Solutions, Inc.* v. *Med-*

tronic Sofamor Danek USA, Inc., 620 F. 3d 1305, 1319 (CA Fed. 2010).

Second, after establishing objective recklessness, a patentee must show—again by clear and convincing evidence—that the risk of infringement "was either known or so obvious that it should have been known to the accused infringer." *Seagate*, 497 F. 3d, at 1371. Only when both steps have been satisfied can the district court proceed to consider whether to exercise its discretion to award enhanced damages. *Ibid.*

Under Federal Circuit precedent, an award of enhanced damages is subject to trifurcated appellate review. The first step of *Seagate*—objective recklessness—is reviewed *de novo*; the second—subjective knowledge—for substantial evidence; and the ultimate decision—whether to award enhanced damages—for abuse of discretion. See *Bard Peripheral Vascular, Inc.* v. *W. L. Gore & Assoc., Inc.*, 682 F. 3d 1003, 1005, 1008 (CA Fed. 2012); *Spectralytics, Inc.* v. *Cordis Corp.*, 649 F. 3d 1336, 1347 (CA Fed. 2011).

C

1

Petitioner Halo Electronics, Inc., and respondents Pulse Electronics, Inc., and Pulse Electronics Corporation (collectively, Pulse) supply electronic components. 769 F. 3d 1371, 1374–1375 (CA Fed. 2014). Halo alleges that Pulse infringed its patents for electronic packages containing transformers designed to be mounted to the surface of circuit boards. *Id.*, at 1374. In 2002, Halo sent Pulse two letters offering to license Halo's patents. *Id.*, at 1376. After one of its engineers concluded that Halo's patents were invalid, Pulse continued to sell the allegedly infringing products. *Ibid.*

In 2007, Halo sued Pulse. *Ibid.* The jury found that Pulse had infringed Halo's patents, and that there was a high probability it had done so willfully. *Ibid.* The District Court, however, declined to award enhanced damages under

§ 284, after determining that Pulse had at trial presented a defense that "was not objectively baseless, or a 'sham.' " App. to Pet. for Cert. in No. 14–1513, p. 64a (quoting *Bard*, 682 F. 3d, at 1007). Thus, the court concluded, Halo had failed to show objective recklessness under the first step of *Seagate*. App. to Pet. for Cert. in No. 14–1513, at 65a. The Federal Circuit affirmed. 769 F. 3d 1371 (2014).

2

Petitioners Stryker Corporation, Stryker Puerto Rico, Ltd., and Stryker Sales Corporation (collectively, Stryker) and respondents Zimmer, Inc., and Zimmer Surgical, Inc. (collectively, Zimmer), compete in the market for orthopedic pulsed lavage devices. App. to Pet. for Cert. in No. 14–1520, p. 49a. A pulsed lavage device is a combination spray gun and suction tube, used to clean tissue during surgery. *Ibid.* In 2010, Stryker sued Zimmer for patent infringement. 782 F. 3d 649, 653 (CA Fed. 2015). The jury found that Zimmer had willfully infringed Stryker's patents and awarded Stryker $70 million in lost profits. *Ibid.* The District Court added $6.1 million in supplemental damages and then trebled the total sum under § 284, resulting in an award of over $228 million. App. in No. 14–1520, pp. 483–484.

Specifically, the District Court noted, the jury had heard testimony that Zimmer had "all-but instructed its design team to copy Stryker's products," App. to Pet. for Cert. in No. 14–1520, at 77a, and had chosen a "high-risk/high-reward strategy of competing immediately and aggressively in the pulsed lavage market," while "opt[ing] to worry about the potential legal consequences later," *id.*, at 52a. "[T]reble damages [were] appropriate," the District Court concluded, "[g]iven the one-sidedness of the case and the flagrancy and scope of Zimmer's infringement." *Id.*, at 119a.

The Federal Circuit affirmed the judgment of infringement but vacated the award of treble damages. 782 F. 3d, at 662. Applying *de novo* review, the court concluded that enhanced damages were unavailable because Zimmer had asserted "reasonable defenses" at trial. *Id.*, at 661–662.

We granted certiorari in both cases, 577 U. S. 938 (2015), and now vacate and remand.

II

A

The pertinent text of § 284 provides simply that "the court may increase the damages up to three times the amount found or assessed." 35 U. S. C. § 284. That language contains no explicit limit or condition, and we have emphasized that the "word 'may' clearly connotes discretion." *Martin* v. *Franklin Capital Corp.*, 546 U. S. 132, 136 (2005) (quoting *Fogerty* v. *Fantasy, Inc.*, 510 U. S. 517, 533 (1994)).

At the same time, "[d]iscretion is not whim." *Martin*, 546 U. S., at 139. "[I]n a system of laws discretion is rarely without limits," even when the statute "does not specify any limits upon the district courts' discretion." *Flight Attendants* v. *Zipes*, 491 U. S. 754, 758 (1989). "[A] motion to a court's discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *Martin*, 546 U. S., at 139 (quoting *United States* v. *Burr*, 25 F. Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C. J.); alteration omitted). Thus, although there is "no precise rule or formula" for awarding damages under § 284, a district court's "discretion should be exercised 'in light of the considerations'" underlying the grant of that discretion. *Octane Fitness*, 572 U. S., at 554 (quoting *Fogerty*, 510 U. S., at 534).

Awards of enhanced damages under the Patent Act over the past 180 years establish that they are not to be meted out in a typical infringement case, but are instead designed as a "punitive" or "vindictive" sanction for egregious infringement behavior. The sort of conduct warranting enhanced damages has been variously described in our cases as willful, wanton, malicious, bad-faith, deliberate, consciously wrongful, flagrant, or—indeed—characteristic of a pirate. See *supra*, at 97–100. District courts enjoy discretion in deciding whether to award enhanced damages, and in what amount. But through nearly two centuries of discretionary awards and review by appellate tribunals, "the channel of discretion ha[s] narrowed," Friendly, Indiscretion About Discretion, 31 Emory L. J. 747, 772 (1982), so that such damages are generally reserved for egregious cases of culpable behavior.

B

The *Seagate* test reflects, in many respects, a sound recognition that enhanced damages are generally appropriate under § 284 only in egregious cases. That test, however, "is unduly rigid, and it impermissibly encumbers the statutory grant of discretion to district courts." *Octane Fitness*, 572 U. S., at 553 (construing § 285 of the Patent Act). In particular, it can have the effect of insulating some of the worst patent infringers from any liability for enhanced damages.

1

The principal problem with *Seagate*'s two-part test is that it requires a finding of objective recklessness in every case before district courts may award enhanced damages. Such a threshold requirement excludes from discretionary punishment many of the most culpable offenders, such as the "wanton and malicious pirate" who intentionally infringes another's patent—with no doubts about its validity or any notion of a defense—for no purpose other than to steal the patentee's business. *Seymour*, 16 How., at 488. Under *Seagate*, a district court may not even consider enhanced damages for such a pirate, unless the court first determines that his infringement was "objectively" reckless. In the context of such deliberate wrongdoing, however, it is not clear why an independent showing of objective recklessness—by clear and convincing evidence, no less—should be a prerequisite to enhanced damages.

Our recent decision in *Octane Fitness* arose in a different context but points in the same direction. In that case we considered § 285 of the Patent Act, which allows district courts to award attorney's fees to prevailing parties in "exceptional" cases. 35 U. S. C. § 285. The Federal Circuit had adopted a two-part test for determining when a case qualified as exceptional, requiring that the claim asserted be both objectively baseless and brought in subjective bad faith. We rejected that test on the ground that a case presenting "subjective bad faith" alone could "sufficiently set itself apart from mine-run cases to warrant a fee award." 572 U. S., at 555. So too here. The subjective willfulness of a patent infringer, intentional or knowing, may warrant enhanced damages, without regard to whether his infringement was objectively reckless.

The *Seagate* test aggravates the problem by making dispositive the ability of the infringer to muster a reasonable (even though unsuccessful) defense at the infringement trial. The existence of such a defense insulates the infringer from enhanced damages, even if he did not act on the basis of the defense or was even aware of it. Under that standard, someone who plunders a patent—infringing it without any reason to suppose his conduct is arguably defensible—can nevertheless escape any comeuppance under § 284 solely on the strength of his attorney's ingenuity.

But culpability is generally measured against the knowledge of the actor at the time of the challenged conduct. See generally Restatement (Second) of Torts § 8A (1965) ("intent" denotes state of mind in which "the actor desires to cause consequences of his act" or "believes" them to be "substantially certain to result from it"); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 34, p. 212 (5th ed. 1984) (describing willful, wanton, and reckless as "look[ing] to the actor's real or supposed state of mind"); see also *Kolstad* v. *American Dental Assn.*, 527 U. S. 526, 538 (1999) ("Most often . . . eligibility for punitive awards is characterized in terms of a defendant's motive or intent"). In *Safeco Ins. Co. of America* v. *Burr*, 551 U. S. 47 (2007), we stated that a person is reckless if he acts "*knowing* or *having reason to know* of facts which would lead a reasonable man to realize" his actions are unreasonably risky. *Id.*, at 69 (emphasis added and internal quotation marks omitted). The Court found that the defendant had not recklessly violated the Fair Credit Reporting Act because the defendant's interpretation had "a foundation in the statutory text" and the defendant lacked "the benefit of guidance from the courts of appeals or the Federal Trade Commission" that "might have warned it away from the view it took." *Id.*, at 69–70. Nothing in *Safeco* suggests that we should look to facts that the defendant neither knew nor had reason to know at the time he acted.*

Section 284 allows district courts to punish the full range of culpable behavior. Yet none of this is to say that enhanced damages must follow a finding of egregious misconduct. As with any exercise of discretion, courts should continue to take into account the particular circumstances of each case in deciding whether to award damages, and in what amount. Section 284 permits district courts to exercise their discretion in a manner free from the inelastic constraints of the *Seagate* test. Consistent with nearly two centuries of enhanced damages under patent law, however, such punishment should generally be reserved for egregious cases typified by willful misconduct.

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*Respondents invoke a footnote in *Safeco* where we explained that in considering whether there had been a knowing or reckless violation of the Fair Credit Reporting Act, a showing of bad faith was not relevant absent a showing of objective recklessness. See 551 U. S., at 70, n. 20. But our precedents make clear that "bad-faith infringement" *is* an independent basis for enhancing patent damages. *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U. S. 476, 508 (1964); see *supra*, at 97–100, 104–105; see also *Safeco*, 551 U. S., at 57 (noting that " 'willfully' is a word of many meanings whose construction is often dependent on the context in which it appears" (some internal quotation marks omitted)).

2

The *Seagate* test is also inconsistent with § 284 because it requires clear and convincing evidence to prove recklessness. On this point *Octane Fitness* is again instructive. There too the Federal Circuit had adopted a clear and convincing standard of proof for awards of attorney's fees under § 285 of the Patent Act. Because that provision supplied no basis for imposing such a heightened standard of proof, we rejected it. See *Octane Fitness*, 572 U. S., at 557–558. We do so here as well. Like § 285, § 284 "imposes no specific evidentiary burden, much less such a high one." *Id.*, at 557. And the fact that Congress expressly erected a higher standard of proof elsewhere in the Patent Act, see 35 U. S. C. § 273(b), but not in § 284, is telling. Furthermore, nothing in historical practice supports a heightened standard. As we explained in *Octane Fitness*, "patent-infringement litigation has always been governed by a preponderance of the evidence standard." 572 U. S., at 557. Enhanced damages are no exception.

3

Finally, because we eschew any rigid formula for awarding enhanced damages under § 284, we likewise reject the Federal Circuit's tripartite framework for appellate review. In *Highmark Inc.* v. *Allcare Health Management System, Inc.*, 572 U. S. 559 (2014), we built on our *Octane Fitness* holding to reject a similar multipart standard of review. Because *Octane Fitness* confirmed district court discretion to award attorney's fees, we concluded that such decisions should be reviewed for abuse of discretion. *Highmark*, 572 U. S., at 560–561.

The same conclusion follows naturally from our holding here. Section 284 gives district courts discretion in meting out enhanced damages. It "commits the determination" whether enhanced damages are appropriate "to the discretion of the district court" and "that decision is to be reviewed on appeal for abuse of discretion." *Id.*, at 563.

That standard allows for review of district court decisions informed by "the considerations we have identified." *Octane Fitness*, 572 U. S., at 554 (internal quotation marks omitted). The appellate review framework adopted by the Federal Circuit reflects a concern that district courts may award enhanced damages too readily, and distort the balance between the protection of patent rights and the interest in technological innovation. Nearly two centuries of exercising discretion in awarding enhanced damages in patent cases, however, has given substance to the notion that there are limits to that discretion. The Federal Circuit should review such exercises of discretion in light of the longstanding considerations we have identified as having guided both Congress and the courts.

III

For their part, respondents argue that Congress ratified the *Seagate* test when it passed the America Invents Act of 2011 and reenacted § 284 without pertinent change. See Brief for Respondents in No. 14–1520, p. 27 (citing *Lorillard* v. *Pons*, 434 U. S. 575, 580 (1978)). But the language Congress reenacted unambiguously confirmed discretion in the district courts. Congress's retention of § 284 could just as readily reflect an intent that enhanced damages be awarded as they had been for nearly two centuries, through the exercise of such discretion, informed by settled practices. Respondents point to isolated snippets of legislative history referring to *Seagate* as evidence of congressional endorsement of its framework, but other morsels—such as Congress's failure to adopt a proposed codification similar to *Seagate*—point in the opposite direction. See, *e. g.*, H. R. 1260, 111th Cong., 1st Sess. § 5(e) (2009).

Respondents also seize on an addition to the Act addressing opinions of counsel. Section 298 provides that "[t]he failure of an infringer to obtain the advice of counsel," or "the failure of the infringer to present such advice to the court or jury, may not be used to prove that the accused infringer willfully infringed." 35 U. S. C. § 298. Respondents contend that the reference to willfulness reflects an endorsement of *Seagate*'s willfulness test. But willfulness has always been a part of patent law, before and after *Seagate*. Section 298 does not show that Congress ratified *Seagate*'s particular conception of willfulness. Rather, it simply addressed the fallout from the Federal Circuit's opinion in *Underwater Devices Inc.* v. *Morrison-Knudsen Co.*, 717 F. 2d 1380 (1983), which had imposed an "affirmative duty" to obtain advice of counsel prior to initiating any possible infringing activity, *id.*, at 1389–1390. See, *e. g.*, H. R. Rep. No. 112–98, pt. 1, p. 53 (2011).

At the end of the day, respondents' main argument for retaining the *Seagate* test comes down to a matter of policy. Respondents and their *amici* are concerned that allowing district courts unlimited discretion to award up to treble damages in infringement cases will impede innovation as companies steer well clear of any possible interference with patent rights. They also worry that the ready availability of such damages will embolden "trolls." Trolls, in the patois of the patent community, are entities that hold patents for the primary purpose of enforcing them against alleged infringers, often exacting outsized licensing fees on threat of litigation.

Respondents are correct that patent law reflects "a careful balance between the need to promote innovation" through patent protection, and the importance of facilitating the "imitation and refinement through imitation" that are "necessary to invention itself and the very lifeblood of a competitive economy." *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U. S. 141, 146 (1989). That balance can indeed be disrupted if enhanced damages are awarded in garden-variety cases. As we have explained, however, they should not be. The seriousness of respondents' policy concerns cannot justify imposing an artificial construct such as the *Seagate* test on the discretion conferred under § 284.

* * *

Section 284 gives district courts the discretion to award enhanced damages against those guilty of patent infringement. In applying this discretion, district courts are "to be guided by [the] sound legal principles" developed over nearly two centuries of application and interpretation of the Patent Act. *Martin*, 546 U. S., at 139 (internal quotation marks omitted). Those principles channel the exercise of discretion, limiting the award of enhanced damages to egregious cases of misconduct beyond typical infringement. The *Seagate* test, in contrast, unduly confines the ability of district courts to exercise the discretion conferred on them. Because both cases before us were decided under the *Seagate* framework, we vacate the judgments of the Federal Circuit and remand the cases for proceedings consistent with this opinion.

It is so ordered.

JUSTICE BREYER, with whom JUSTICE KENNEDY and JUSTICE ALITO join, concurring.

I agree with the Court that *In re Seagate Technology, LLC*, 497 F. 3d 1360 (CA Fed. 2007) (en banc), takes too mechanical an approach to the award of enhanced damages. But, as the Court notes, the relevant statutory provision, 35 U. S. C. § 284, nonetheless imposes limits that help produce uniformity in its application and maintain its consistency with the basic objectives of patent law. See U. S. Const., Art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts"). I write separately to express my own understanding of several of those limits.

First, the Court's references to "willful misconduct" do not mean that a court may award enhanced damages simply because the evidence shows that the infringer knew about the patent *and nothing more. Ante*, at 106. " '[W]illfu[l]' is a 'word of many meanings whose construction is often dependent on the context in which it appears.' " *Safeco Ins. Co. of*

America v. *Burr*, 551 U. S. 47, 57 (2007). Here, the Court's opinion, read as a whole and in context, explains that "enhanced damages are generally appropriate . . . *only in egregious cases*." *Ante*, at 104 (emphasis added); *ante*, at 106 (Enhanced damages "should generally be reserved for *egregious cases* typified by willful misconduct" (emphasis added)). They amount to a " 'punitive' " sanction for engaging in conduct that is either "deliberate" or "wanton." *Ante*, at 103; compare *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U. S. 476, 508 (1964) ("bad-faith infringement"), and *Seymour* v. *McCormick*, 16 How. 480, 488 (1854) ("malicious pirate"), with *ante*, at 105–106, and n. ("objective recklessness"). The Court refers, by way of example, to a " 'wanton and malicious pirate' who intentionally infringes another's patent—with no doubts about its validity or any notion of a defense—for no purpose other than to steal the patentee's business." *Ante*, at 104. And while the Court explains that "intentional or knowing" infringement "may" warrant a punitive sanction, the word it uses is *may*, not *must*. *Ante*, at 105. It is "circumstanc[e]" that transforms simple knowledge into such egregious behavior, and that makes all the difference. *Ante*, at 106.

Second, the Court writes against a statutory background specifying that the "failure of an infringer to obtain the advice of counsel . . . may not be used to prove that the accused infringer wilfully infringed." § 298. The Court does not weaken this rule through its interpretation of § 284. Nor should it. It may well be expensive to obtain an opinion of counsel. See Brief for Public Knowledge et al. as *Amici Curiae* 9 ("[O]pinion[s] [of counsel] could easily cost up to $100,000 per patent"); Brief for Internet Companies as *Amici Curiae* 13 (such opinions cost "tens of thousands of dollars"). Such costs can prevent an innovator from getting a small business up and running. At the same time, an owner of a small firm, or a scientist, engineer, or technician working there, might, without being "wanton" or "reckless," reasonably determine that its product does not infringe a particular patent, or that that patent is probably invalid. Cf. *Association for Molecular Pathology* v. *Myriad Genetics, Inc.*, 569 U. S. 576, 591 (2013) (The "patent['s] [own] descriptions highlight the problem[s] with its claims"). I do not say that a lawyer's informed opinion would be unhelpful. To the contrary, consulting counsel may help draw the line between infringing and noninfringing uses. But on the other side of the equation lie the costs and the consequent risk of discouraging lawful innovation. Congress has thus left it to the potential infringer to decide whether to consult counsel—without the threat of treble damages influencing that decision. That is, Congress has determined that where both "advice of counsel" and "increased damages" are at issue, insisting upon the legal game is not worth the candle. Compare § 298 with § 284.

Third, as the Court explains, enhanced damages may not "serve to compensate patentees" for infringement-related costs or litigation expenses. *Ante,* at 99. That is because § 284 provides for the former *prior* to any enhancement. § 284 (enhancement follows award of "damages adequate to compensate for the infringement"); see *ante,* at 99–100. And a different statutory provision, § 285, provides for the latter. *Ibid.*; *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 572 U. S. 545, 554 (2014) (fee awards may be appropriate in a case that is "'exceptional'" in respect to "the unreasonable manner in which [it] was litigated").

I describe these limitations on enhanced damages awards for a reason. Patent infringement, of course, is a highly undesirable and unlawful activity. But stopping infringement is a means to patent law's ends. Through a complex system of incentive-based laws, patent law helps to encourage the development of, disseminate knowledge about, and permit others to benefit from useful inventions. Enhanced damages have a role to play in achieving those objectives, but, as described above, that role is limited.

Consider that the U. S. Patent and Trademark Office estimates that more than 2,500,000 patents are currently in force. See Dept. of Commerce, Patent and Trademark Office, A. Marco, M. Carley, S. Jackson, & A. Myers, The USPTO Historical Patent Files: Two Centuries of Invention, No. 2015–1, p. 32, fig. 6 (June 2015). Moreover, Members of the Court have noted that some "firms use patents . . . primarily [to] obtai[n] licensing fees." *eBay Inc.* v. *MercExchange, L. L. C.*, 547 U. S. 388, 396 (2006) (KENNEDY, J., concurring). *Amici* explain that some of those firms generate revenue by sending letters to " 'tens of thousands of people asking for a license or settlement' " on a patent " 'that may in fact not be warranted.' " Brief for Internet Companies as *Amici Curiae* 12; cf. Letter to Dr. Thomas Cooper (Jan. 16, 1814), in 6 Writings of Thomas Jefferson 295 (H. Washington ed. 1854) (lamenting "abuse of the frivolous patents"). How is a growing business to react to the arrival of such a letter, particularly if that letter carries with it a serious risk of treble damages? Does the letter put the company "on notice" of the patent? Will a jury find that the company behaved "recklessly," simply for failing to spend considerable time, effort, and money obtaining expert views about whether some or all of the patents described in the letter apply to its activities (and whether those patents are even valid)? These investigative activities can be costly. Hence, the risk of treble damages can encourage the company to settle, or even abandon any challenged activity.

To say this is to point to a risk: The more that businesses, laboratories, hospitals, and individuals adopt this approach, the more often a patent will reach beyond its lawful scope to discourage lawful activity, and the more often patent-related demands will frustrate, rather than "promote," the "Progress of Science and useful Arts." U. S. Const., Art. I, §8, cl. 8; see, *e. g.*, *Eon-Net LP* v. *Flagstar Bancorp*, 653 F. 3d 1314, 1327 (CA Fed. 2011) (patent holder "acted in bad faith by exploiting the high cost to defend [patent] litigation to extract a nuisance value settlement"); *In re MPHJ Technology Invs., LLC*, 159 F. T. C. 1004, 1007–1012 (2015) (patent owner sent more than 16,000 letters demanding settlement for using "common office equipment" under a patent it never intended to litigate); Brief for Internet Companies as *Amici Curiae* 15 (threat of enhanced damages hinders "collaborative efforts" to set "industry-wide" standards for matters such as internet protocols); Brief for Public Knowledge et al. as *Amici Curiae* 6 (predatory patent practices undermined "a new and highly praised virtual-reality glasses shopping system"). Thus, in the context of enhanced damages, there are patent-related risks on both sides of the equation. That fact argues, not for abandonment of enhanced damages, but for their careful application, to ensure that they only target cases of egregious misconduct.

One final point: The Court holds that awards of enhanced damages should be reviewed for an abuse of discretion. *Ante*, at 107–108. I agree. But I also believe that, in applying that standard, the Federal Circuit may take advantage of its own experience and expertise in patent law. Whether, for example, an infringer truly had "no doubts about [the] validity" of a patent may require an assessment of the reasonableness of a defense that may be apparent from the face of that patent. See *ante*, at 104. And any error on such a question would be an abuse of discretion. *Highmark Inc.* v. *Allcare Health Management System, Inc.*, 572 U. S. 559, 563, n. 2 (2014) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law" (internal quotation marks omitted)).

Understanding the Court's opinion in the ways described above, I join its opinion.

COMMONWEALTH OF PUERTO RICO ET AL. *v.* FRANKLIN CALIFORNIA TAX-FREE TRUST ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 15–233. Argued March 22, 2016—Decided June 13, 2016*

In response to an ongoing fiscal crisis, petitioner Puerto Rico enacted the Puerto Rico Public Corporation Debt Enforcement and Recovery Act. Portions of the Recovery Act mirror Chapters 9 and 11 of the Federal Bankruptcy Code and enable Puerto Rico's public utility corporations to restructure their climbing debt. Respondents, a group of investment funds and utility bondholders, sought to enjoin the Act. They contended, among other things, that a Bankruptcy Code provision explicitly pre-empts the Recovery Act, see 11 U. S. C. § 903(1). The District Court enjoined the Act's enforcement, and the First Circuit affirmed, concluding that the Bankruptcy Code's definition of "State" to include Puerto Rico, except for purposes of defining who may be a debtor under Chapter 9, § 101(52), did not remove Puerto Rico from the scope of the pre-emption provision.

Held: Section 903(1) of the Bankruptcy Code pre-empts Puerto Rico's Recovery Act. Pp. 121–130.

(a) Three federal municipal bankruptcy provisions are relevant here. First, the "gateway" provision, § 109(c), requires a Chapter 9 debtor to be an insolvent municipality that is "specifically authorized" by a State "to be a debtor." Second, the pre-emption provision, § 903(1), expressly bars States from enacting municipal bankruptcy laws. Third, the definition of "State," § 101(52), as amended in 1984, "includes . . . Puerto Rico, except for the purpose of defining who may be a debtor under chapter 9." Pp. 121–124.

(b) If petitioners are correct that the amended definition of "State" excludes Puerto Rico altogether from Chapter 9, then the pre-emption provision does not apply. But if respondents' narrower reading is correct and the definition only precludes Puerto Rico from authorizing its municipalities to seek Chapter 9 relief, then Puerto Rico is barred from implementing its Recovery Act. Pp. 124–130.

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*Together with No. 15–255, *Acosta-Febo et al.* v. *Franklin California Tax-Free Trust et al.*, also on certiorari to the same court.

(1) The Bankruptcy Code's plain text supports respondents' reading. The unambiguous language of the pre-emption provision "contains an express pre-emption clause," the plain wording of which "necessarily contains the best evidence of Congress' pre-emptive intent." *Chamber of Commerce of United States of America* v. *Whiting*, 563 U. S. 582, 594. The definition provision excludes Puerto Rico for the single purpose of defining who may be a Chapter 9 debtor, an unmistakable reference to the § 109 gateway provision. This conclusion is reinforced by the definition's use of the phrase "defining who may be a debtor under chapter 9," § 101(52), which is tantamount to barring Puerto Rico from "specifically authorizing" which municipalities may file Chapter 9 petitions under the gateway provision, § 903(1). The text of the exclusion thus extends no further. Had Congress intended to exclude Puerto Rico from Chapter 9 altogether, including Chapter 9's pre-emption provision, Congress would have said so. Pp. 125–127.

(2) The amended definition of "State" does not exclude Puerto Rico from all of Chapter 9's provisions. First, Puerto Rico's exclusion as a "State" for purposes of the gateway provision does not also remove Puerto Rico from Chapter 9's separate pre-emption provision. A State that chooses under the gateway provision not to authorize a municipality to file is still bound by the pre-emption provision. Likewise, Puerto Rico is bound by the pre-emption provision, even though Congress has removed its authority under the gateway provision to authorize its municipalities to seek Chapter 9 relief. Second, because Puerto Rico was not "by definition" excluded from Chapter 9, both § 903's introductory clause and its proviso, the pre-emption provision, continue to apply in Puerto Rico. Finally, the argument that the Recovery Act is not a "State law" that can be pre-empted is based on technical amendments to the terms "creditor" and "debtor" that are too "subtle" to support such a "[f]undamental chang[e] in the scope" of Chapter 9's pre-emption provision. *Kellogg Brown & Root Services, Inc.* v. *United States ex rel. Carter*, 575 U. S. 650, 660. Pp. 127–130.

805 F. 3d 322, affirmed.

Thomas, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Breyer, and Kagan, JJ., joined. Sotomayor, J., filed a dissenting opinion, in which Ginsburg, J., joined, *post*, p. 131. Alito, J., took no part in the consideration or decision of the cases.

Christopher Landau argued the cause for petitioners in both cases. With him on the briefs for petitioners in No. 15–233 were *Claire McCusker Murray, César Miranda*

Rodríguez, and *Margarita Mercado Echegaray*. *Martin J. Bienenstock*, *Mark D. Harris*, *Sigal Mandelker*, *Philip M. Abelson*, *Ehud Barak*, *John E. Roberts*, *Andrea G. Miller*, *Laura Stafford*, and *José R. Coleman-Tío* filed a brief for petitioners in No. 15–255.

Matthew D. McGill argued the cause for respondents in both cases. With him on the brief for respondent Blue Mountain Capital Management, LLC, were *Theodore B. Olson*, *Jonathan C. Bond*, *Russell B. Balikian*, *David C. Indiano*, *Jeffrey M. Williams*, and *Leticia Casalduc-Rabell*. *Thomas Moers Mayer*, *Philip Bentley*, *Amy Caton*, and *David E. Blabey, Jr.*, filed a brief for the Franklin respondents.†

Justice Thomas delivered the opinion of the Court.

The Federal Bankruptcy Code pre-empts state bankruptcy laws that enable insolvent municipalities to restructure their debts over the objections of creditors and instead requires municipalities to restructure such debts under Chapter 9 of the Code. 11 U. S. C. § 903(1). We must decide whether

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†Briefs of *amici curiae* urging reversal in both cases were filed for Colegio de Abrogados y Abrogadas de Puerto Rico et al. by *Betty Lugo*, *Carmen A. Pacheco*, and *Mark Anthony Bimbela*; for LatinoJustice PRLDEF et al. by *Edward H. Tillinghast III*, *Jennifer A. Trusso*, *Robert J. Stumpf, Jr.*, and *Juan Cartagena*; for the Puerto Rico Electric Power Authority by *Lewis J. Liman*, *Lawrence B. Friedman*, *Richard J. Cooper*, and *Sean A. O'Neal*; for Puerto Rico Manufacturers Association by *Luis Sánchez Betances*; and for Clayton P. Gillette et al. by *Randy A. Hertz*.

Briefs of *amici curiae* urging reversal were filed in No. 15–233 for Fundación Ángel Ramos, Inc., et al., by *José L. Nieto-Mingo*; and for Gregorio Igartua by *Mr. Igartua*, *pro se*.

Briefs of *amici curiae* urging affirmance in both cases were filed for the Association of Financial Guaranty Insurers by *Marc E. Kasowitz*, *Daniel R. Benson*, *Joseph I. Lieberman*, *Clarine Nardi Riddle*, and *Andrew K. Glenn*; for the Chamber of Commerce of the United States of America by *William S. Consovoy*, *Bryan K. Weir*, *Kate Comerford Todd*, and *Steven P. Lehotsky*; and for Scotiabank de Puerto Rico by *George T. Conway III*, *Richard G. Mason*, *Emil A. Kleinhaus*, and *Antonio A. Arias-Larcada*.

Puerto Rico is a "State" for purposes of this pre-emption provision. We hold that it is.

The Bankruptcy Code has long included Puerto Rico as a "State," but in 1984 Congress amended the definition of "State" to exclude Puerto Rico "for the purpose of defining who may be a debtor under chapter 9." Bankruptcy Amendments and Federal Judgeship Act, § 421(j)(6), 98 Stat. 368–369, now codified at 11 U. S. C. § 101(52). Puerto Rico interprets this amended definition to mean that Chapter 9 no longer applies to it, so it is no longer a "State" for purposes of Chapter 9's pre-emption provision. We hold that Congress' exclusion of Puerto Rico from the definition of a "State" in the amended definition does not sweep so broadly. By excluding Puerto Rico "for the purpose of *defining who may be a debtor under chapter 9*," § 101(52) (emphasis added), the Code prevents Puerto Rico from authorizing its municipalities to seek Chapter 9 relief. Without that authorization, Puerto Rico's municipalities cannot qualify as Chapter 9 debtors. § 109(c)(2). But Puerto Rico remains a "State" for other purposes related to Chapter 9, including that chapter's pre-emption provision. That provision bars Puerto Rico from enacting its own municipal bankruptcy scheme to restructure the debt of its insolvent public utilities companies.

I

A

Puerto Rico and its instrumentalities are in the midst of a fiscal crisis. More than $20 billion of Puerto Rico's climbing debt is shared by three government-owned public utilities companies: the Puerto Rico Electric Power Authority, the Puerto Rico Aqueduct and Sewer Authority, and the Puerto Rico Highways and Transportation Authority. For the fiscal year ending in 2013, the three public utilities operated with a combined deficit of $800 million. The Government Development Bank for Puerto Rico (Bank)—the Commonwealth's government-owned bank and fiscal agent—has previously provided financing to enable the utilities to continue operating without defaulting on their debt obligations. But the Bank now faces a fiscal crisis of its own. As of fiscal year 2013, it had loaned nearly half of its assets to Puerto Rico and its public utilities. Puerto Rico's access to capital markets has also been severely compromised since ratings agencies downgraded Puerto Rican bonds, including the utilities', to noninvestment grade in 2014.

Puerto Rico responded to the fiscal crisis by enacting the Puerto Rico Corporation Debt Enforcement and Recovery Act (Recovery Act) in 2014, which enables the Commonwealth's public utilities to implement a recovery or restructuring plan for their debt. 2014 Laws P. R. p. 371. See generally McGowen, Puerto Rico Adopts a Debt Recovery Act for Its Public Corporations, 10 Pratt's J. Bkrtcy. Law 453 (2014). Chapter 2 of the Recovery Act creates a "consensual" debt modification procedure that permits the public utilities to propose changes to the terms of the outstanding debt instruments, for example, changing the interest rate or the maturity date of the debt. 2014 Laws P. R., at 428–429. In conjunction with the debt modification, the public utility must also propose a Bank-approved recovery plan to bring it back to financial self-sufficiency. *Ibid.* The debt modification binds all creditors so long as those holding at least 50% of affected debt participate in (or consent to) a vote regarding the modifications, and the participating creditors holding at least 75% of affected debt approve the modifications. *Id.*, at 430. Chapter 3 of the Recovery Act, on the other hand, mirrors Chapters 9 and 11 of the Federal Bankruptcy Code by creating a court-supervised restructuring process intended to offer the best solution for the broadest group of creditors. See *id.*, at 448–449. Creditors holding two-thirds of an affected class of debt must participate in the vote to approve the restructuring plan, and half of those participants must agree to the plan. *Id.*, at 449.

B

A group of investment funds, including the Franklin California Tax-Free Trust, and BlueMountain Capital Management, LLC, brought separate suits against Puerto Rico and various government officials, including agents of the Bank, to enjoin the enforcement of the Recovery Act. Collectively, the plaintiffs hold nearly $2 billion in bonds issued by the Electric Power Authority, one of the distressed utilities. The complaints alleged, among other claims, that the Federal Bankruptcy Code prohibited Puerto Rico from implementing its own municipal bankruptcy scheme.

The District Court consolidated the suits and ruled in the plaintiffs' favor on their pre-emption claim. 85 F. Supp. 3d 577 (PR 2015). The court concluded that the pre-emption provision in Chapter 9 of the Federal Bankruptcy Code, 11 U. S. C. § 903(1), precluded Puerto Rico from implementing the Recovery Act and enjoined its enforcement. 85 F. Supp. 3d, at 601, 614.

The First Circuit affirmed. 805 F. 3d 322 (2015). The court examined the 1984 amendment to the definition of "State" in the Federal Bankruptcy Code, which includes Puerto Rico as a "State" for purposes of the Code " '*except* for the purpose of defining who may be a debtor under chapter 9.' " *Id.*, at 330–331 (quoting § 101(52); emphasis added). The court concluded that the amendment did not remove Puerto Rico from the scope of the pre-emption provision and held that the pre-emption provision barred the Recovery Act. *Id.*, at 336–337. The court opined that it was up to Congress, not Puerto Rico, to decide when the government-owned companies could seek bankruptcy relief. *Id.*, at 345.

We granted the Commonwealth's petitions for writs of certiorari. 577 U. S. 1025 (2015).*

*After the parties briefed and argued these cases, Members of Congress introduced a bill in the House of Representatives to establish an oversight board to assist Puerto Rico and its instrumentalities. See H. 5278, 114th Cong., 2d Sess. (2016). The bill does not amend the Federal

II

These cases require us to parse three provisions of the Bankruptcy Code: the "who may be a debtor" provision requiring States to authorize municipalities to seek Chapter 9 relief, § 109(c), the pre-emption provision barring States from enacting their own municipal bankruptcy schemes, § 903(1), and the definition of "State," § 101(52). We first explain the text and history of these provisions. We then conclude that Puerto Rico is still a "State" for purposes of the pre-emption provision and hold that this provision pre-empts the Recovery Act.

A

The Constitution empowers Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States." Art. I, § 8, cl. 4. Congress first exercised that power by enacting a series of temporary bankruptcy Acts beginning in 1800, which gave way to a permanent federal bankruptcy scheme in 1898. See An Act To Establish a Uniform System of Bankruptcy Throughout the United States, 30 Stat. 544; *Hanover Nat. Bank* v. *Moyses*, 186 U. S. 181, 184 (1902). But Congress did not enter the field of municipal bankruptcy until 1933 when it enacted the precursor to Chapter 9, a chapter of the Code enabling an insolvent "municipality," meaning a "political subdivision or public agency or instrumentality of a State," 11 U. S. C. § 101(40), to restructure municipal debts. See McConnell & Picker, When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy, 60 U. Chi. L. Rev. 425, 427, 450–451 (1993).

Congress has tailored the federal municipal bankruptcy laws to preserve the States' reserved powers over their municipalities. This Court struck down Congress' first attempt to enable the States' political subdivisions to file for federal bankruptcy relief after concluding that it infringed the

Bankruptcy Code; it instead proposes adding a chapter to Title 48, governing the Territories. *Id.*, § 6.

States' powers "to manage their own affairs." *Ashton* v. *Cameron County Water Improvement Dist. No. One*, 298 U. S. 513, 531 (1936). Congress tried anew in 1937, and the Court upheld the amended statute as an appropriate balance of federal and state power. See *United States* v. *Bekins*, 304 U. S. 27, 49–53 (1938). Critical to the Court's constitutional analysis was that the State had first authorized its instrumentality to seek relief under the federal bankruptcy laws. See *id.*, at 47–49, 53–54.

Still today, the provision of the Bankruptcy Code defining who may be a debtor under Chapter 9, which we refer to here as the "gateway" provision, requires the States to authorize their municipalities to seek relief under Chapter 9 before the municipalities may file a Chapter 9 petition:

> "§ 109. Who may be a debtor
>
> . . . . .
>
> "(c) An entity may be a debtor under chapter 9 of this title if and only if such entity—
>
> "(1) is a municipality;
>
> "(2) is specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter . . . ."

The States' powers are not unlimited, however. The federal bankruptcy laws changed again in 1946 to bar the States from enacting their own municipal bankruptcy schemes. The amendment overturned this Court's holding in *Faitoute Iron & Steel Co.* v. *Asbury Park*, 316 U. S. 502, 507–509 (1942) (rejecting contention that Congress occupied the field of municipal bankruptcy law). In *Faitoute*, the Court held that federal bankruptcy laws did not pre-empt New Jersey's municipal bankruptcy scheme, which required municipalities to seek relief under state law before resorting to the federal municipal bankruptcy scheme. *Ibid.* To override *Faitoute*, Congress enacted a provision expressly pre-empting state municipal bankruptcy laws. Act of July 1, 1946, 60 Stat. 415.

The express pre-emption provision, central to these cases, is now codified with some stylistic changes in § 903(1):

> "§ 903. Reservation of State power to control municipalities
>
> "This chapter does not limit or impair the power of a State to control, by legislation or otherwise, a municipality of or in such State in the exercise of the political or governmental powers of such municipality, including expenditures for such exercise, but—
>
> "(1) a State law prescribing a method of composition of indebtedness of such municipality may not bind any creditor that does not consent to such composition; and
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> "(2) a judgment entered under such a law may not bind a creditor that does not consent to such composition."

The third provision of the Bankruptcy Code at issue is the definition of "State," which has included Puerto Rico since it became a Territory of the United States in 1898. The first Federal Bankruptcy Act, also enacted in 1898, defined "States" to include "the Territories, the Indian Territory, Alaska, and the District of Columbia." 30 Stat. 545. When Congress recodified the bankruptcy laws to form the Federal Bankruptcy Code in 1978, the definition of "State" dropped out of the definitional section. See generally Bankruptcy Reform Act, 92 Stat. 2549–2554. Congress then amended the Code to reincorporate the definition of "State" in 1984. § 421, 98 Stat. 368–369, now codified at § 101(52). The amended definition includes Puerto Rico as a State for purposes of the Code with one exception:

"§ 101. Definitions

. . . . .

"(52) The term 'State' includes the District of Columbia and Puerto Rico, except for the purpose of defining who may be a debtor under chapter 9 of this title."

B

It is our task to determine the effect of the amended definition of "State" on the Code's other provisions governing Chapter 9 proceedings. We must decide whether, in light of the amended definition, Puerto Rico is no longer a "State" only for purposes of the gateway provision, which requires States to authorize their municipalities to seek Chapter 9 relief, or whether Puerto Rico is also no longer a "State" for purposes of the pre-emption provision.

The parties do not dispute that, before 1984, Puerto Rico was a "State" for purposes of Chapter 9's pre-emption provision. Accordingly, before 1984, federal law would have preempted the Recovery Act because it is a "State law prescribing a method of composition of indebtedness" for Puerto Rico's instrumentalities that would bind nonconsenting creditors, § 903(1).

The parties part ways, however, in deciphering how the 1984 amendment to the definition of "State" affected the preemption provision. Petitioners interpret the amended definition of "State" to exclude Puerto Rico altogether from Chapter 9. If petitioners are correct, then the pre-emption provision does not apply to them. Puerto Rico, in other words, may enact its own municipal bankruptcy scheme without running afoul of the Code. Respondents, on the other hand, read the amended definition narrowly. They contend that the definition precludes Puerto Rico from "specifically authoriz[ing]" its municipalities to seek relief, as required by the gateway provision, § 109(c)(2), but that Puerto Rico is no less a "State" for purposes of the pre-emption provision than the other "State[s]," as that term is defined in the Code. If respondents are correct, then the pre-emption provision applies to Puerto Rico and bars it from enacting the Recovery Act.

Respondents have the better reading. We hold that Puerto Rico is still a "State" for purposes of the pre-emption provision. The 1984 amendment precludes Puerto Rico from authorizing its municipalities to seek relief under Chapter 9, but it does not remove Puerto Rico from the reach of Chapter 9's pre-emption provision.

1

The plain text of the Bankruptcy Code begins and ends our analysis. Resolving whether Puerto Rico is a "State" for purposes of the pre-emption provision begins "with the language of the statute itself," and that "is also where the inquiry should end," for "the statute's language is plain." *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 241 (1989). And because the statute "contains an express pre-emption clause," we do not invoke any presumption against preemption but instead "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *Chamber of Commerce of United States of America* v. *Whiting*, 563 U. S. 582, 594 (2011) (internal quotation marks omitted); see also *Gobeille* v. *Liberty Mut. Ins. Co.*, 577 U. S. 312, 325 (2016).

The amended definition of "State" excludes Puerto Rico for the single "purpose of defining *who may be a debtor* under chapter 9 of this title." § 101(52) (emphasis added). That exception unmistakably refers to the gateway provision in § 109, titled "who may be a debtor." Section 109(c) begins, "An entity may be a debtor under chapter 9 of this title if and only if . . . ." We interpret Congress' use of the "who may be a debtor" language in the amended definition of "State" to mean that Congress intended to exclude Puerto Rico from this gateway provision delineating who may be a debtor under Chapter 9. See, *e. g.*, *Sullivan* v. *Stroop*, 496

U. S. 478, 484 (1990) (reading same term used in different parts of the same Act to have the same meaning); see also *Northcross* v. *Board of Ed. of Memphis City Schools*, 412 U. S. 427, 428 (1973) (*per curiam*) ("[S]imilarity of language . . . is . . . a strong indication that the two statutes should be interpreted *pari passu*"). Puerto Rico, therefore, is not a "State" for purposes of the gateway provision, so it cannot perform the single function of the "State[s]" under that provision: to "specifically authoriz[e]" municipalities to seek Chapter 9 relief. § 109(c). As a result, Puerto Rico's municipalities cannot satisfy the requirements of Chapter 9's gateway provision until Congress intervenes.

The amended definition's use of the term "defining" also confirms our conclusion that the amended definition excludes Puerto Rico as a "State" for purposes of the gateway provision. The definition specifies that Puerto Rico is not a " 'State . . . for the purpose of *defining* who may be a debtor under chapter 9." § 101(52) (emphasis added). To "define" is "to decide upon," 4 Oxford English Dictionary 383 (2d ed. 1989), or "to settle" or "to establish or prescribe authoritatively," Black's Law Dictionary 380 (5th ed. 1979). As discussed, a State's role under the gateway provision is to do just that: The State must define (or "decide upon") which entities may seek Chapter 9 relief. Barring Puerto Rico from "*defining* who may be a debtor under chapter 9" is tantamount to barring Puerto Rico from "specifically authorizing" which municipalities may file Chapter 9 petitions under the gateway provision. The amended definition of "State" unequivocally excludes Puerto Rico as a "State" for purposes of the gateway provision.

The text of the definition extends no further. The exception excludes Puerto Rico *only* for purposes of the gateway provision. Puerto Rico is no less a "State" for purposes of the pre-emption provision than it was before Congress amended the definition. The Code's pre-emption provision has prohibited States and Territories defined as "States" from enacting their own municipal bankruptcy schemes for 70 years. See 60 Stat. 415 (overturning *Faitoute*, 316 U. S., at 507–509). Had Congress intended to "alter th[is] fundamental detai[l]" of municipal bankruptcy, we would expect the text of the amended definition to say so. *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001). Congress "does not, one might say, hide elephants in mouseholes." *Ibid.*

2

The dissent, adopting many of petitioners' arguments, reads the amended definition to say what it does not—that "for the purpose of . . . chapter 9," Puerto Rico is not a State. The arguments in support of that capacious reading are unavailing.

First, the dissent agrees with petitioners' view that the exclusion of Puerto Rico as a "State" for purposes of the gateway provision effectively removed Puerto Rico from all of Chapter 9. See *post*, at 136–137 (opinion of SOTOMAYOR, J.). To be sure, § 109(c) and the surrounding subsections serve an important gatekeeping role. Those provisions "specify who qualifies—and who does not qualify—as a debtor under the various chapters of the Code." *Toibb* v. *Radloff*, 501 U. S. 157, 161 (1991). For instance, a railroad must file under Chapter 11, not Chapter 7, §§ 109(b)(1), (d), whereas only "family farmer[s] or family fisherm[e]n" may file under Chapter 12, § 109(f). The provision delineating who may be a debtor under Chapter 9 is no exception. Only municipalities may file under Chapter 9, and only if the State has "specifically authorized" the municipality to do so. §§ 109(c)(1)–(2); see also McConnell & Picker, 60 Chi. L. Rev., at 455–461 (discussing the gatekeeping requirements for Chapter 9).

That Puerto Rico is not a "State" for purposes of the gateway provision, however, says nothing about whether Puerto Rico is a "State" for the other provisions of Chapter 9 involving the States. The States do not "pass through" the gateway provision. *Post*, at 137. The gateway provision is instead directed at the debtors themselves—the municipalities, in the case of Chapter 9 bankruptcy. A *municipality* that cannot secure state authorization to file a Chapter 9 petition is excluded from Chapter 9 entirely. But the same cannot be said about the *State* in which that municipality is located. A State's only role under the gateway provision is to provide that "authoriz[ation]" to file. § 109(c)(2). The pre-emption provision then imposes an additional requirement: The States may not enact their own municipal bankruptcy schemes. A State that chooses not to authorize its municipalities to seek Chapter 9 relief under the gateway provision is no less bound by that pre-emption provision. Here too, Puerto Rico is no less bound by the pre-emption provision even though Congress has removed its authority to provide authorization for its municipalities to file Chapter 9 petitions. Again, if it were Congress' intent to also exclude Puerto Rico as a "State" for purposes of that pre-emption provision, it would have said so.

Second, both petitioners and the dissent place great weight on the introductory clause of § 903. *Post,* at 135–136. The pre-emption provision cannot apply to Puerto Rico, so goes the argument, because it is a proviso to § 903's introductory clause, which they posit is inapplicable to Puerto Rico. The introductory clause affirms that Chapter 9 "does not limit or impair the power of a State to control" its "municipalit[ies]." § 903. The dissent surmises that this clause "is irrelevant" and "meaningless" in Puerto Rico. *Post,* at 136. Because Puerto Rico's municipalities are ineligible for Chapter 9 relief, Chapter 9 cannot "affec[t] Puerto Rico's control over its municipalities," according to the dissent. *Ibid.* In other words, "there is no power" for the introductory clause to "reserve" for Puerto Rico's use. *Ibid.* Petitioners likewise contend that "it would be nonsensical for Congress to provide Puerto Rico with a shield against intrusion by a Chapter that, by definition, can have no effect on Puerto Rico." Brief for Petitioner Commonwealth of Puerto Rico et al. in

No. 15–233, p. 25. So "it follows" that the pre-emption provision, the proviso to that clause, cannot apply either. *Ibid.*

This reading rests on the faulty assumption that Puerto Rico is, "by definition," excluded from Chapter 9. *Ibid.* For all of the reasons already explained, see Part II–B–1, *supra*, it is not. The amended definition of "State" precludes Puerto Rico from authorizing its municipalities to seek Chapter 9 relief. But Puerto Rico is no less a "State" for purposes of § 903's introductory clause and its proviso. Both continue to apply in Puerto Rico. They are neither "irrelevant" nor "meaningless." *Post*, at 136. If, for example, Congress created a path for the Puerto Rican municipalities to restructure their debts under Chapter 9, then § 903 would assure Puerto Rico, no less a "State" for purposes of this section, of its continued power to "control, by legislation or otherwise, [its] municipalit[ies] . . . in the exercise of the political or governmental powers of such municipalit[ies]."

Third, the Government Development Bank contends that the Recovery Act does not run afoul of the pre-emption provision because the Recovery Act does not bind nonconsenting "creditors," as the Bankruptcy Code now defines that term. In 1978, Congress redefined "creditor" to mean an "entity that has a claim against the *debtor* . . . ." 92 Stat. 2550, now codified at § 101(10) (emphasis added). A "debtor," in turn, is a "person or municipality concerning which a case under this title has been *commenced*." *Id.*, at 2551, now codified at § 101(13) (emphasis added). In light of these definitions, the Bank contends that the Puerto Rican municipalities are not "debtor[s]" as the Code defines the term because they cannot "commenc[e]" an action under Chapter 9 without authorization from Puerto Rico. Brief for Petitioner Acosta-Febo et al. 31–33. And because respondents cannot be "creditors" of a nonexistent "debtor," the Recovery Act is not a "State law" that binds "any creditor." § 903(1). *Id.*, at 31–33.

Tellingly, the dissent does not adopt this reading. The Bank's interpretation would nullify the pre-emption provision. Applying the Bank's logic, a municipality that fails to meet any one of the requirements of Chapter 9's gatekeeping provision is not a "debtor" and would have no "creditors." So a State could refuse to "specifically authoriz[e]" its municipalities to seek relief under Chapter 9, § 109(c)(2), required to commence a case under that chapter. That State would be free to enact its own municipal bankruptcy scheme because its municipalities would have no "creditors" under federal law. The technical amendments to the definitions of "creditor" and "debtor" are too "subtle a move" to support such a "[f]undamental chang[e] in the scope" of Chapter 9's pre-emption provision. *Kellogg Brown & Root Services, Inc.* v. *United States ex rel. Carter*, 575 U. S. 650, 660 (2015).

* * *

The dissent concludes that "the government and people of Puerto Rico should not have to wait for possible congressional action to avert the consequences" of the Commonwealth's fiscal crisis. *Post*, at 139. But our constitutional structure does not permit this Court to "rewrite the statute that Congress has enacted." *Dodd* v. *United States*, 545 U. S. 353, 359 (2005); see also *Electric Storage Battery Co.* v. *Shimadzu*, 307 U. S. 5, 14 (1939). That statute precludes Puerto Rico from authorizing its municipalities to seek relief under Chapter 9. But it does not remove Puerto Rico from the scope of Chapter 9's pre-emption provision. Federal law, therefore, pre-empts the Recovery Act. The judgment of the Court of Appeals for the First Circuit is affirmed.

It is so ordered.

Justice Alito took no part in the consideration or decision of these cases.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

Chapter 9 of the Federal Bankruptcy Code allows States' "municipalities"—cities, utilities, levee boards, and the like—to file for federal bankruptcy with their State's authorization. But the Code excludes Puerto Rican municipalities from accessing federal bankruptcy. 11 U. S. C. §§ 101(52), 109(c)(2). Because of this bar, Puerto Rico enacted its own law in 2014—the Recovery Act—to allow its utilities to restructure their significant debts outside the federal bankruptcy process.

The Court today holds that Puerto Rico's Recovery Act is barred by § 903(1) of Chapter 9 of the Bankruptcy Code, which prohibits States from creating their own bankruptcy processes for their insolvent municipalities. Because Puerto Rican municipalities cannot access Chapter 9's federal bankruptcy process, however, a nonfederal bankruptcy solution is not merely a parallel option; it is the only existing legal option for Puerto Rico to restructure debts that could cripple its citizens. The structure of the Code and the language and purpose of § 903 demonstrate that Puerto Rico's municipal debt restructuring law should not be read to be prohibited by Chapter 9.

I respectfully dissent.

I

The Commonwealth of Puerto Rico and its municipalities are in the middle of a fiscal crisis. *Ante*, at 118. The combined debt of Puerto Rico's three main public utilities exceeds $20 billion. These utilities provide power, water, sewer, and transportation to residents of the island. With rising interest rates and limited access to capital markets, their debts are proving unserviceable. Soon, Puerto Rico and the utilities contend, they will be unable to pay for things like fuel to generate electricity, which will lead to rolling blackouts. Other vital public services will be imperiled, including the utilities' ability to provide safe drinking water, maintain roads, and operate public transportation.

When debtors face untenable debt loads, bankruptcy is the primary tool the law uses to forge workable long-term solutions. By requiring a debtor and creditors to negotiate together and forcing both sides to make concessions within the limits set by law, bankruptcy gives the debtor a "fresh start," discourages creditors from racing each other to sue the debtor, prohibits a small number of holdout creditors from blocking a compromise, protects important creditor rights such as the prioritization of debts, and allows all parties to find equitable and efficient solutions to fiscal problems. See *Marrama* v. *Citizens Bank of Mass.*, 549 U. S. 365, 367 (2007); *Young* v. *Higbee Co.*, 324 U. S. 204, 210 (1945).

These concerns are starkly presented in the context of municipal entities like public utilities. While a business corporation can use bankruptcy to reorganize, and, if that fails, fold up shop and liquidate all of its assets, governments cannot shut down powerplants, water, hospitals, sewers, and trains and leave citizens to fend for themselves. A "fresh start" can help not only the unfortunate individual debtor but also—and perhaps especially—the unfortunate municipality and its people. See *United States* v. *Bekins*, 304 U. S. 27, 53–54 (1938).

Congress has excluded the municipalities of Puerto Rico and the District of Columbia from the federal municipal bankruptcy scheme in Chapter 9 of the Bankruptcy Code. See 11 U. S. C. §§ 101(52), 109(c). So, in 2014, the Puerto Rican Government enacted the Puerto Rico Public Corporation Debt Enforcement and Recovery Act (Recovery Act or Act). 2014 Laws P. R. p. 371. The Act authorizes Puerto Rico's public utilities to restructure their debts while continuing to provide essential public services like electricity and water. Portions of the Act mirror Chapter 9 of the Bankruptcy Code and allow Puerto Rico's utilities to renegotiate their debts with their creditors. See *ante,* at 119. Like a restructuring plan filed under Chapter 9, a restructuring plan under the Recovery Act that is approved by at least a majority of creditors and a court would be binding on all creditors, including objecting holdouts.

After the Recovery Act was signed into law, mutual funds and hedge funds holding bonds of the Puerto Rico Electric Power Authority filed two lawsuits seeking to enjoin Puerto Rico's enforcement of the Act. The District Court held that the Recovery Act could not be enforced because, *inter alia*, it was prohibited by § 903(1) of the Bankruptcy Code. The First Circuit agreed that § 903(1) pre-empted the Act and did not address whether some provisions of the Act might be unlawful for other reasons. This Court now affirms.

II

Bankruptcy is not a one-size-fits-all process. The Federal Bankruptcy Code sets out specific procedures and governing law for each type of entity that seeks bankruptcy protection. To see how this approach works, consider the structure of the Code in more depth.

Chapter 1 is the starting point. It sets out how to read the Code. See 11 U. S. C. § 101 *et seq.* For example, § 101 sets out general definitions, and § 102 provides rules of construction. Now skip ahead to § 109, titled, "Who may be a debtor." That section tells would-be debtors and the interested parties in their bankruptcy which specific bankruptcy laws apply to them. For example, § 109 tells an ordinary person seeking to restructure her debts to do so using the rules outlined in Chapter 7, § 109(b), or those enumerated in Chapter 13, § 109(e). It tells a family farm or fisherman to use the rules outlined in Chapter 12. § 109(f). Certain corporations can use Chapter 7, § 109(b), or Chapter 11, § 109(d). And a municipality's bankruptcy is governed by the rules in Chapter 9. § 109(c)(1).

Because § 109 tells different kinds of debtors which bodies of bankruptcy law apply to them, the Court has described that section as a "'gateway'" provision. *Ante*, at 122. Once an entity meets the eligibility requirements for a specific "gateway" set out in § 109 and elects to pass through that gateway, it becomes subject to the relevant chapter of the Code—7, 9, 11, 12, or 13. The debtor, its creditors, and any other interested parties are governed only by that chapter and the chapters of the Bankruptcy Code—like Chapter 1—that apply to all cases. See § 103; 1 Collier Pamphlet Edition, Bankruptcy Code 2016, p. 59 ("[A]s a general rule, the provisions of the particular chapter apply only in that chapter").

Interpreting statutory provisions in the context of the operative chapters in the Bankruptcy Code in which they appear is not unusual—it is how the Code is designed to work. For example, both Chapter 9 and Chapter 13 require the debtor to "file a plan" proposing how the court should reorganize its debts. Compare §§ 941–946 ("The Plan" under Chapter 9) with §§ 1321–1330 ("The Plan" under Chapter 13). But no bankruptcy court or practitioner would suggest that a Chapter 9 "plan" also has to satisfy the requirements of Chapter 13. The Code is read in context.

These cases concern § 109's "gateway" for municipalities. That provision says that a municipality may file for bankruptcy under Chapter 9 if and only if it meets five eligibility criteria. The debtor must (1) be "a municipality," § 109(c)(1); (2) be "specifically authorized . . . by State law" to seek bankruptcy restructuring, § 109(c)(2); (3) be "insolvent," § 109(c)(3); (4) have a "desir[e] to effect a plan to adjust" its debts, § 109(c)(4); and (5) have attempted to negotiate with its creditors, with some exceptions, § 109(c)(5).

The second eligibility requirement is relevant here. Only a municipality "authorized . . . by *State* law" may pass through the "gateway" and file for bankruptcy under Chapter 9's provisions. But Chapter 1's definitional provision, which applies throughout the Code, provides that the "term 'State' includes the District of Columbia and Puerto Rico, except for the purpose of defining who may be a debtor under chapter 9 of this title." § 101(52). It is undisputed that the "except for the purpose of defining who may be a debtor under chapter 9" clause is referring to the second eligibility prerequisite in § 109's gateway provision. *Ante,* at 124. So, in short, Puerto Rico cannot "specifically authoriz[e]" any of its municipalities to apply for Chapter 9 bankruptcy. No Puerto Rican municipality will thus satisfy the state authorization requirement of § 109's gateway for municipalities, and so no Puerto Rican municipality can access Chapter 9.[1]

The question in these cases is whether § 903(1), a preemption provision in Chapter 9, still applies to Puerto Rico even though its municipalities are not eligible to pass through the "gateway" into Chapter 9. It should not. Section 903 by its terms presupposes that Chapter 9 applies only to States who have the power to authorize their municipalities to invoke its protection.

Section 903 delineates the balance of power between the States that can authorize their municipalities to access Chapter 9 protection and the bankruptcy court that would preside over any municipal bankruptcy commenced under Chapter 9. To understand that interplay, and why § 903(1) does not preempt the Recovery Act, it is important to consider that statutory provision in context.

Section 903, titled "Reservation of State power to control municipalities," reads in full:

> "This chapter [Chapter 9] does not limit or impair the power of a State to control, by legislation or otherwise, a municipality of or in such State in the exercise of the political or governmental powers of such municipality, including expenditures for such exercise, but—

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[1] Puerto Rico was initially included in the scope of Chapter 9. § 1(29), 52 Stat. 842. But in 1984, Congress amended the Bankruptcy Code, without comment, to bar Puerto Rico and the District of Columbia from authorizing their municipalities to access Chapter 9. § 421(j)(6), 98 Stat. 368–369, codified at 11 U. S. C. § 101(52).

> "(1) a State law prescribing a method of composition of indebtedness of such municipality may not bind any creditor that does not consent to such composition; and
>
> "(2) a judgment entered under such a law may not bind a creditor that does not consent to such composition."

This "reservation" of power to the States was added to the Code in response to this Court's earlier recognition that States possess plenary control over their municipalities, particularly in fiscal matters. *Faitoute Iron & Steel Co.* v. *Asbury Park*, 316 U. S. 502, 509 (1942), overruled in part by Act of July 1, 1946, 60 Stat. 415. Section 903 says that States continue to possess those powers not implicated by the bankruptcy itself by noting that "[t]his chapter," *i. e.*, Chapter 9, "does not limit or impair the power of a State to control" its municipalities. § 903. For example, even if a municipality is in Chapter 9 bankruptcy, a State could still revoke its charter.

Section 903, however, also subjects that broad reservation to an exception articulated in the pre-emption provision that the Court now says bars Puerto Rico's Recovery Act. States may control their municipalities, but they may not "prescrib[e] a method of composition of indebtedness of [a] municipality" that "bind[s] any creditor that does not consent to such composition." § 903(1).

But this distribution of power between the State and the bankruptcy court is irrelevant to Puerto Rico. Because Puerto Rico's municipalities cannot pass through the § 109(c) gateway to Chapter 9, nothing in the operation of a Chapter 9 case affects Puerto Rico's control over its municipalities. The "reservation" preamble is therefore meaningless to Puerto Rico—there is no power to reserve from Chapter 9's operation. And if this preamble does not and cannot apply to Puerto Rico, it follows that § 903(1)'s proviso qualifying that reservation of power to the States does not apply to

Puerto Rico either. See, *e. g., United States* v. *Morrow,* 266 U. S. 531, 534–535 (1925).

This understanding of § 903 is fundamentally confirmed by the careful gateway structure the Code sets out for understanding how its chapters work together. See *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 320 (2014) ("'"[W]ords of a statute must be read in their context and with a view to their place in the overall statutory scheme"'" (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 133 (2000))). Chapter 1's definitions section prevents Puerto Rico from defining "who may be a debtor under chapter 9" under § 109(c)'s gateway. Because of the structure of the Code, that change to Chapter 1's definition has ripple effects. By amending the definition of State to exclude Puerto Rico, the District of Columbia, and their municipalities from § 109(c)'s gateway, Congress excluded Puerto Rico from Chapter 9 for all purposes—it shut the gate and barred it tight. And because Chapter 9's process and rules by their terms can only affect municipalities and States eligible to pass through the gateway in § 109(c), that must mean that none of Chapter 9's provisions—including § 903's pre-emption provision—apply to Puerto Rico and its municipalities.

III

The Court rejects contextual analysis in favor of a syllogism. According to the Court, § 903(1) pre-empts all "State" composition laws like Puerto Rico's that bind nonconsenting municipal creditors. "State" includes Puerto Rico, "except for the purpose of defining who may be a debtor under chapter 9 of this title," § 101(52), which is a reference to § 109(c). Thus, according to the Court, while the definition of "State" prevents Puerto Rico from authorizing its municipalities to seek Chapter 9 protection under § 109(c), it has no effect on the pre-emption clause in § 903(1).

The majority's plain meaning syllogism is not without force. But it ignores this Court's repeated exhortations to read statutes in context of the overall statutory scheme. *Utility Air*, 573 U. S., at 320. In context, for the reasons discussed, § 903 is directed to States that can approve their municipalities for Chapter 9 bankruptcy. Moreover, in an attempt to buttress its syllogism, the majority's analysis makes an additional critical misstep.

The majority argues that, in light of the longstanding nature of the § 903(1)'s pre-emption provision to preclude state municipal bankruptcy laws, "[h]ad Congress intended to 'alter this fundamental detail' of municipal bankruptcy" to not apply to Puerto Rico, "we would expect the text of the amended definition to say so. Congress 'does not, one might say, hide elephants in mouseholes.'" *Ante*, at 127 (quoting *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001); citation and brackets omitted). But the Court ignores that Congress already altered the fundamental details of municipal bankruptcy when it amended the definition of "State" to exclude Puerto Rico from authorizing its municipalities to take advantage of Chapter 9. Nobody has presented a compelling reason for why Congress would have done so, and the legislative history of the amendment is unhelpful.[2] Under either interpretation the scheme has been fundamentally altered by Congress. And, in context, the proper understanding of that alteration is that Puerto Rico and its municipalities have been removed entirely from Chapter 9—both from the benefits it provides and from the burden of the pre-emption clause in § 903(1).

Pre-emption cases may seem like abstract discussions of the appropriate balance between state and federal power.

[2] The only comment on excluding Puerto Rico from Chapter 9 came from Professor Frank Kennedy, former Executive Director of the Commission on Bankruptcy Laws, who said: "I do not understand why the municipal corporations of Puerto Rico are denied by the proposed definition of 'State' of the right to seek relief under Chapter 9." Bankruptcy Improvements Act, Hearing on S. 333 et al. before the Senate Committee on the Judiciary, 98th Cong., 1st Sess., 326 (1983).

But they have real-world consequences. Finding pre-emption here means that a government is left powerless and with no legal process to help its 3.5 million citizens.

Congress could step in to resolve Puerto Rico's crisis. But, in the interim, the government and people of Puerto Rico should not have to wait for possible congressional action to avert the consequences of unreliable electricity, transportation, and safe water—consequences that members of the Executive and Legislative Branches have described as a looming "humanitarian crisis." The White House, Addressing Puerto Rico's Economic and Fiscal Crisis and Creating a Path to Recovery, p. 1 (Oct. 26, 2015) (italics deleted); Letter from Sen. Richard Blumenthal et al. to Charles Grassley, Chair, Senate Committee on the Judiciary (Sept. 30, 2015). Statutes should not easily be read as removing the power of a government to protect its citizens.

* * *

For the foregoing reasons, I would hold that § 903(1) of the Bankruptcy Code does not pre-empt Puerto Rico's Recovery Act. I respectfully dissent.

Syllabus

UNITED STATES *v.* BRYANT

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15–420. Argued April 19, 2016—Decided June 13, 2016

In response to the high incidence of domestic violence against Native American women, Congress enacted a felony offense of domestic assault in Indian country by a habitual offender. 18 U. S. C. § 117(a). Section 117(a)(1) provides that any person who "commits a domestic assault within . . . Indian country" and who has at least two prior final convictions for domestic violence rendered "in Federal, State, or Indian tribal court proceedings . . . shall be fined . . . , imprisoned for a term of not more than 5 years, or both . . . ." Having two prior tribal-court convictions for domestic violence crimes is thus a predicate of the new offense.

This case raises the question whether § 117(a)'s inclusion of tribal-court convictions as predicate offenses is compatible with the Sixth Amendment's right to counsel. The Sixth Amendment guarantees indigent defendants appointed counsel in any state or federal criminal proceeding in which a term of imprisonment is imposed, *Scott* v. *Illinois*, 440 U. S. 367, 373–374, but it does not apply in tribal-court proceedings, see *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U. S. 316, 337. The Indian Civil Rights Act of 1968 (ICRA), which governs tribal-court proceedings, accords a range of procedural safeguards to tribal-court defendants "similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment," *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 57. In particular, ICRA provides indigent defendants with a right to appointed counsel only for sentences exceeding one year. 25 U. S. C. § 1302(c)(2). ICRA's right to counsel therefore is not coextensive with the Sixth Amendment right.

This Court has held that a conviction obtained in state or federal court in violation of a defendant's Sixth Amendment right to counsel cannot be used in a subsequent proceeding "to support guilt or enhance punishment for another offense." *Burgett* v. *Texas*, 389 U. S. 109, 115. Use of a constitutionally infirm conviction would cause "the accused in effect [to] suffe[r] anew from the [prior] deprivation of [his] Sixth Amendment right." *Ibid*. *Burgett*'s principle was limited by the Court's holding in *Nichols* v. *United States*, 511 U. S. 738, that "an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction," *id.*, at 748–749.

Syllabus

Respondent Michael Bryant, Jr., has multiple tribal-court convictions for domestic assault. When convicted, Bryant was indigent and was not appointed counsel. For most of his convictions, he was sentenced to terms of imprisonment not exceeding one year's duration. Because of his short prison terms, the prior tribal-court proceedings complied with ICRA, and his convictions were therefore valid when entered. Based on domestic assaults he committed in 2011, Bryant was indicted on two counts of domestic assault by a habitual offender, in violation of § 117(a). Represented in federal court by appointed counsel, he contended that the Sixth Amendment precluded use of his prior, uncounseled, tribal-court misdemeanor convictions to satisfy § 117(a)'s predicate-offense element and moved to dismiss the indictment. The District Court denied the motion; Bryant pleaded guilty, reserving the right to appeal. The Ninth Circuit reversed the conviction and directed dismissal of the indictment. It comprehended that Bryant's uncounseled tribal-court convictions were valid when entered because the Sixth Amendment right to counsel does not apply in tribal-court proceedings. It held, however, that Bryant's tribal-court convictions could not be used as predicate convictions within § 117(a)'s compass because they would have violated the Sixth Amendment had they been rendered in state or federal court.

Held: Because Bryant's tribal-court convictions occurred in proceedings that complied with ICRA and were therefore valid when entered, use of those convictions as predicate offenses in a § 117(a) prosecution does not violate the Constitution.

Nichols instructs that convictions valid when entered retain that status when invoked in a subsequent proceeding. *Nichols* reasoned that "[e]nhancement statutes . . . do not change the penalty imposed for the earlier conviction"; rather, repeat-offender laws "penaliz[e] only the last offense committed by the defendant." 511 U. S., at 747. Bryant's sentence for violating § 117(a) punishes his most recent acts of domestic assault, not his prior crimes prosecuted in tribal court. He was denied no right to counsel in tribal court, and his Sixth Amendment right was honored in federal court. Bryant acknowledges that *Nichols* would have allowed reliance on uncounseled tribal-court convictions resulting in fines to satisfy § 117(a)'s prior-crimes predicate. But there is no cause to distinguish for § 117(a) purposes between fine-only tribal-court convictions and valid but uncounseled tribal-court convictions resulting in imprisonment for a term not exceeding one year. Neither violates the Sixth Amendment. Bryant is not aided by *Burgett.* A defendant convicted in tribal court suffered no Sixth Amendment violation in the first instance, so he cannot "suffe[r] anew" from a prior deprivation in his federal prosecution.

Bryant also invokes the Due Process Clause of the Fifth Amendment to support his assertion that tribal-court judgments should not be used as predicate offenses under § 117(a). ICRA, however, guarantees "due process of law," accords other procedural safeguards, and permits a prisoner to challenge the fundamental fairness of tribal-court proceedings in federal habeas corpus proceedings. Because proceedings in compliance with ICRA sufficiently ensure the reliability of tribal-court convictions, the use of those convictions in a federal prosecution does not violate a defendant's due process right. Pp. 154–157.

769 F. 3d 671, reversed and remanded.

Ginsburg, J., delivered the opinion for a unanimous Court. Thomas, J., filed a concurring opinion, *post*, p. 157.

Elizabeth B. Prelogar argued the cause for the United States. With her on the briefs were *Solicitor General Verrilli*, *Assistant Attorney General Caldwell*, *Deputy Solicitor General Dreeben*, and *Demetra Lambros*.

Steven C. Babcock argued the cause for respondent. With him on the brief were *Anthony R. Gallagher*, *Michael Donahoe*, and *Joslyn Hunt*.*

Justice Ginsburg delivered the opinion of the Court.

In response to the high incidence of domestic violence against Native American women, Congress, in 2005, enacted 18 U. S. C. § 117(a), which targets serial offenders. Section 117(a) makes it a federal crime for any person to "commi[t] a

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*Briefs of *amici curiae* urging reversal were filed for the National Congress of American Indians by *Joshua M. Segal* and *Mark P. Gaber*; for the National Indigenous Women's Resource Center et al. by *Mary Kathryn Nagle*; and for Dennis K. Burke et al. by *Eric J. Magnuson* and *Katherine S. Barrett Wiik*.

Briefs of *amici curiae* urging affirmance were filed for the Citizens Equal Rights Foundation by *James J. Devine, Jr.*; for Criminal Justice Organizations et al. by *Gene C. Schaerr, S. Kyle Duncan, Sara B. Thomas, David J. Euchner, Mikel P. Steinfeld, Talmage E. Newton IV, Rankin Johnson IV*, and *Thomas E. Weaver*; for the National Association of Criminal Defense Lawyers et al. by *Daniel L. Kaplan* and *Barbara E. Bergman*; and for Barbara L. Creel et al. by *Ms. Creel*, *pro se*, and *John P. LaVelle*.

domestic assault within . . . Indian country" if the person has at least two prior final convictions for domestic violence rendered "in Federal, State, or Indian tribal court proceedings." See Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA Reauthorization Act), Pub. L. 109–162, §§ 901, 909, 119 Stat. 3077, 3084.[1] Respondent Michael Bryant, Jr., has multiple tribal-court convictions for domestic assault. For most of those convictions, he was sentenced to terms of imprisonment, none of them exceeding one year's duration. His tribal-court convictions do not count for § 117(a) purposes, Bryant maintains, because he was uncounseled in those proceedings.

The Sixth Amendment guarantees indigent defendants, in state and federal criminal proceedings, appointed counsel in any case in which a term of imprisonment is imposed. *Scott* v. *Illinois*, 440 U. S. 367, 373–374 (1979). But the Sixth Amendment does not apply to tribal-court proceedings. See *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U. S. 316, 337 (2008). The Indian Civil Rights Act of 1968 (ICRA), Pub. L. 90–284, 82 Stat. 77, 25 U. S. C. § 1301 *et seq.*, which governs criminal proceedings in tribal courts, requires appointed counsel only when a sentence of more than one year's imprisonment is imposed. § 1302(c)(2). Bryant's tribal-court convictions, it is undisputed, were valid when entered. This case presents the question whether those convictions, though uncounseled, rank as predicate offenses within the compass of § 117(a). Our answer is yes. Bryant's tribal-court convictions did not violate the Sixth Amendment when obtained, and they retain their validity when invoked in a § 117(a) prosecution. That proceeding generates no Sixth Amendment defect where none previously existed.

[1] "Indian country" is defined in 18 U. S. C. § 1151 to encompass all land within any Indian reservation under federal jurisdiction, all dependent Indian communities, and all Indian allotments, the Indian titles to which have not been extinguished.

I

A

"[C]ompared to all other groups in the United States," Native American women "experience the highest rates of domestic violence." 151 Cong. Rec. 9061 (2005) (remarks of Sen. McCain). According to the Centers for Disease Control and Prevention, as many as 46% of American Indian and Alaska Native women have been victims of physical violence by an intimate partner. Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, M. Black et al., National Intimate Partner and Sexual Violence Survey 2010 Summary Report 40 (2011) (Table 4.3), online at http://www.cdc.gov/ViolencePrevention/pdf/NISVS_report2010-a.pdf (all Internet materials as last visited June 9, 2016). American Indian and Alaska Native women "are 2.5 times more likely to be raped or sexually assaulted than women in the United States in general." Dept. of Justice, Attorney General's Advisory Committee on American Indian and Alaska Native Children Exposed to Violence, Ending Violence So Children Can Thrive 38 (Nov. 2014), online at https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2015/03/23/ending_violence_so_children_can_thrive.pdf. American Indian women experience battery "at a rate of 23.2 per 1,000, compared with 8 per 1,000 among Caucasian women," and they "experience 7 sexual assaults per 1,000, compared with 4 per 1,000 among Black Americans, 3 per 1,000 among Caucasians, 2 per 1,000 among Hispanic women, and 1 per 1,000 among Asian women." VAWA Reauthorization Act, § 901, 119 Stat. 3077.

As this Court has noted, domestic abusers exhibit high rates of recidivism, and their violence "often escalates in severity over time." *United States* v. *Castleman*, 572 U. S. 157, 160 (2014). Nationwide, over 75% of female victims of intimate-partner violence have been previously victimized by the same offender, Dept. of Justice, Bureau of Justice Statistics, S. Catalano, Intimate Partner Violence 1993–2010, p. 4 (rev. 2015) (Figure 4), online at http://www.bjs.gov/content/pub/pdf/ipv9310.pdf, often multiple times, Dept. of Justice, National Institute of Justice, P. Tjaden & N. Thoennes, Extent, Nature, and Consequences of Intimate Partner Violence, p. iv (2000), online at https://www.ncjrs.gov/pdffiles1/nij/181867.pdf ("[W]omen who were physically assaulted by an intimate partner averaged 6.9 physical assaults by the same partner."). Incidents of repeating, escalating abuse more than occasionally culminate in a fatal attack. See VAWA Reauthorization Act, § 901, 119 Stat. 3077–3078 ("[D]uring the period 1979 through 1992, homicide was the third leading cause of death of Indian females aged 15 to 34, and 75 percent were killed by family members or acquaintances.").

The "complex patchwork of federal, state, and tribal law" governing Indian country, *Duro* v. *Reina*, 495 U. S. 676, 680, n. 1 (1990), has made it difficult to stem the tide of domestic violence experienced by Native American women. Although tribal courts may enforce the tribe's criminal laws against Indian defendants, Congress has curbed tribal courts' sentencing authority. At the time of § 117(a)'s passage, ICRA limited sentences in tribal court to a maximum of one year's imprisonment. 25 U. S. C. § 1302(a)(7) (2006 ed.).[2] Congress has since expanded tribal courts' sentencing authority, allowing them to impose up to three years' imprisonment, contingent on adoption of additional procedural safeguards. 124 Stat. 2279–2280 (codified at 25 U. S. C. § 1302(a)(7)(C), (c)).[3] To date, however, few tribes have employed this enhanced sentencing authority. See Tribal Law and Policy Inst., Implementation Chart: VAWA

[2] Until 1986, ICRA permitted sentences of imprisonment up to only six months. See 100 Stat. 3207–146.

[3] Among the additional safeguards attending longer sentences is the unqualified right of an indigent defendant to appointed counsel. 25 U. S. C. § 1302(c)(1), (2).

Enhanced Jurisdiction and TLOA Enhanced Sentencing, online at http://www.tribal-institute.org/download/VAWA/VAWAImplementationChart.pdf.[4]

States are unable or unwilling to fill the enforcement gap. Most States lack jurisdiction over crimes committed in Indian country against Indian victims. See *United States* v. *John*, 437 U. S. 634, 651 (1978). In 1953, Congress increased the potential for state action by giving six States "jurisdiction over specified areas of Indian country within the States and provid[ing] for the [voluntary] assumption of jurisdiction by other States." *California* v. *Cabazon Band of Mission Indians*, 480 U. S. 202, 207 (1987) (footnote omitted). See Act of Aug. 15, 1953, Pub. L. 280, 67 Stat. 588 (codified, as amended, at 18 U. S. C. § 1162 and 25 U. S. C. §§ 1321–1328, 1360). States so empowered may apply their own criminal laws to "offenses committed by or against Indians within all Indian country within the State." *Cabazon Band of Mission Indians*, 480 U. S., at 207; see 18 U. S. C. § 1162(a). Even when capable of exercising jurisdiction, however, States have not devoted their limited criminal justice resources to crimes committed in Indian country. Jimenez & Song, Concurrent Tribal and State Jurisdiction Under Public Law 280, 47 Am. U. L. Rev. 1627, 1636–1637 (1998); Tribal Law and Policy Inst., S. Deer, C. Goldberg, H. Valdez Singleton, & M. White Eagle, Final Report: Focus Group on

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[4] Tribal governments generally lack criminal jurisdiction over non-Indians who commit crimes in Indian country. See *Oliphant* v. *Suquamish Tribe*, 435 U. S. 191, 195 (1978). In the Violence Against Women Reauthorization Act of 2013, Congress amended ICRA to authorize tribal courts to "exercise special domestic violence criminal jurisdiction" over certain domestic violence offenses committed by a non-Indian against an Indian. Pub. L. 113–4, § 904, 127 Stat. 120–122 (codified at 25 U. S. C. § 1304). Tribal courts' exercise of this jurisdiction requires procedural safeguards similar to those required for imposing on Indian defendants sentences in excess of one year, including the unqualified right of an indigent defendant to appointed counsel. See § 1304(d). We express no view on the validity of those provisions.

Public Law 280 and the Sexual Assault of Native Women 7–8 (2007), online at http://www.tribal-institute.org/download/Final%20280%20FG%20Report.pdf.

That leaves the Federal Government. Although federal law generally governs in Indian country, Congress has long excluded from federal-court jurisdiction crimes committed by an Indian against another Indian. 18 U. S. C. § 1152; see *Ex parte Crow Dog*, 109 U. S. 556, 572 (1883) (requiring "a clear expression of the intention of Congress" to confer federal jurisdiction over crimes committed by an Indian against another Indian). In the Major Crimes Act, Congress authorized federal jurisdiction over enumerated grave criminal offenses when the perpetrator is an Indian and the victim is "another Indian or other person," including murder, manslaughter, and felony assault. § 1153. At the time of § 117(a)'s enactment, felony assault subject to federal prosecution required "serious bodily injury," § 113(a)(6) (2006 ed.), meaning "a substantial risk of death," "extreme physical pain," "protracted and obvious disfigurement," or "protracted loss or impairment of the function of a bodily member, organ, or mental faculty." § 1365(h)(3) (incorporated through § 113(b)(2)).[5] In short, when § 117(a) was before Congress, Indian perpetrators of domestic violence "escape[d] felony charges until they seriously injure[d] or kill[ed] someone." 151 Cong. Rec. 9062 (2005) (remarks of Sen. McCain).

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[5] Congress has since expanded the definition of felony assault to include "[a]ssault resulting in substantial bodily injury to a spouse[,] . . . intimate partner, [or] dating partner" and "[a]ssault of a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or suffocate." Violence Against Women Reauthorization Act of 2013, § 906, 127 Stat. 124 (codified at 18 U. S. C. § 113(a)(7), (8)). The "substantial bodily injury" requirement remains difficult to satisfy, as it requires "a temporary but substantial disfigurement" or "a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty." § 113(b)(1).

As a result of the limitations on tribal, state, and federal jurisdiction in Indian country, serial domestic violence offenders, prior to the enactment of § 117(a), faced at most a year's imprisonment per offense—a sentence insufficient to deter repeated and escalating abuse. To ratchet up the punishment of serial offenders, Congress created the federal felony offense of domestic assault in Indian country by a habitual offender. § 117(a) (2012 ed.); see 792 F. 3d 1042, 1045 (2015) (Owens, J., dissenting from denial of rehearing en banc) ("Tailored to the unique problems . . . that American Indian and Alaska Native Tribes face, § 117(a) provides felony-level punishment for serial domestic violence offenders, and it represents the first true effort to remove these recidivists from the communities that they repeatedly terrorize."). The section provides in pertinent part:

> "Any person who commits a domestic assault within . . . Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction any assault, sexual abuse, or serious violent felony against a spouse or intimate partner . . . shall be fined . . . , imprisoned for a term of not more than 5 years, or both . . . ." § 117(a)(1).[6]

Having two prior convictions for domestic violence crimes—including tribal-court convictions—is thus a predicate of the new offense.

B

This case requires us to determine whether § 117(a)'s inclusion of tribal-court convictions is compatible with the Sixth

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[6] Section 117(a) has since been amended to include as qualifying predicate offenses, in addition to intimate-partner crimes, "assault, sexual abuse, [and] serious violent felony" offenses committed "against a child of or in the care of the person committing the domestic assault." 18 U. S. C. § 117(a) (2012 ed., Supp. II).

Amendment's right to counsel. The Sixth Amendment to the U. S. Constitution guarantees a criminal defendant in state or federal court "the Assistance of Counsel for his defence." See *Gideon* v. *Wainwright*, 372 U. S. 335, 339 (1963). This right, we have held, requires appointment of counsel for indigent defendants whenever a sentence of imprisonment is imposed. *Argersinger* v. *Hamlin*, 407 U. S. 25, 37 (1972). But an indigent defendant has no constitutional right to appointed counsel if his conviction results in a fine or other noncustodial punishment. *Scott*, 440 U. S., at 373–374.

"As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 56 (1978). The Bill of Rights, including the Sixth Amendment right to counsel, therefore, does not apply in tribal-court proceedings. See *Plains Commerce Bank*, 554 U. S., at 337.

In ICRA, however, Congress accorded a range of procedural safeguards to tribal-court defendants "similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment." *Martinez*, 436 U. S., at 57; see *id.*, at 62–63 (ICRA "modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments"). In addition to other enumerated protections, ICRA guarantees "due process of law," 25 U. S. C. § 1302(a)(8), and allows tribal-court defendants to seek habeas corpus review in federal court to test the legality of their imprisonment, § 1303.

The right to counsel under ICRA is not coextensive with the Sixth Amendment right. If a tribal court imposes a sentence in excess of one year, ICRA requires the court to accord the defendant "the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution," including appointment of counsel for an indigent defendant at the tribe's expense. § 1302(c)(1), (2). If the sentence imposed is no greater than one year, however, the tribal court must allow a defendant only the opportunity to obtain counsel "at his own expense." § 1302(a)(6). In tribal court, therefore, unlike in federal or state court, a sentence of imprisonment up to one year may be imposed without according indigent defendants the right to appointed counsel.

The question here presented: Is it permissible to use uncounseled tribal-court convictions—obtained in full compliance with ICRA—to establish the prior-crimes predicate of § 117(a)? It is undisputed that a conviction obtained in violation of a defendant's Sixth Amendment right to counsel cannot be used in a subsequent proceeding "either to support guilt or enhance punishment for another offense." *Burgett* v. *Texas*, 389 U. S. 109, 115 (1967). In *Burgett*, we held that an uncounseled felony conviction obtained in state court in violation of the right to counsel could not be used in a subsequent proceeding to prove the prior-felony element of a recidivist statute. To permit such use of a constitutionally infirm conviction, we explained, would cause "the accused in effect [to] suffe[r] anew from the [prior] deprivation of [his] Sixth Amendment right." *Ibid.*; see *United States* v. *Tucker*, 404 U. S. 443, 448 (1972) (invalid, uncounseled prior convictions could not be relied upon at sentencing to impose a longer term of imprisonment for a subsequent conviction); cf. *Loper* v. *Beto*, 405 U. S. 473, 483–484 (1972) (plurality opinion) ("use of convictions constitutionally invalid under *Gideon* v. *Wainwright* to impeach a defendant's credibility deprives him of due process of law" because the prior convictions "lac[k] reliability").

In *Nichols* v. *United States*, 511 U. S. 738 (1994), we stated an important limitation on the principle recognized in *Burgett*. In the case under review, Nichols pleaded guilty to a federal felony drug offense. 511 U. S., at 740. Several years earlier, unrepresented by counsel, he had been convicted of driving under the influence (DUI), a state-law misdemeanor, and fined $250 but not imprisoned. *Ibid.* Nichols' DUI conviction, under the then-mandatory Sentencing Guidelines, effectively elevated by about two years the sentencing range for Nichols' federal drug offense. *Ibid.* We rejected Nichols' contention that, as his later sentence for the federal drug offense involved imprisonment, use of his uncounseled DUI conviction to elevate that sentence violated the Sixth Amendment. *Id.*, at 746–747. "[C]onsistent with the Sixth and Fourteenth Amendments of the Constitution," we held, "an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." *Id.*, at 748–749.

C

Respondent Bryant's conduct is illustrative of the domestic violence problem existing in Indian country. During the period relevant to this case, Bryant, an enrolled member of the Northern Cheyenne Tribe, lived on that Tribe's reservation in Montana. He has a record of over 100 tribal-court convictions, including several misdemeanor convictions for domestic assault. Specifically, between 1997 and 2007, Bryant pleaded guilty on at least five occasions in Northern Cheyenne Tribal Court to committing domestic abuse in violation of the Northern Cheyenne Tribal Code. On one occasion, Bryant hit his live-in girlfriend on the head with a beer bottle and attempted to strangle her. On another, Bryant beat a different girlfriend, kneeing her in the face, breaking her nose, and leaving her bruised and bloodied.

For most of Bryant's repeated brutal acts of domestic violence, the Tribal Court sentenced him to terms of imprisonment, never exceeding one year. When convicted of these offenses, Bryant was indigent and was not appointed counsel. Because of his short prison terms, Bryant acknowledges, the prior tribal-court proceedings complied with ICRA, and his convictions were therefore valid when entered. Bryant has never challenged his tribal-court convictions in federal court under ICRA's habeas corpus provision.

In 2011, Bryant was arrested yet again for assaulting women. In February of that year, Bryant attacked his then girlfriend, dragging her off the bed, pulling her hair, and repeatedly punching and kicking her. During an interview with law enforcement officers, Bryant admitted that he had physically assaulted this woman five or six times. Three months later, he assaulted another woman with whom he was then living, waking her by yelling that he could not find his truck keys and then choking her until she almost lost consciousness. Bryant later stated that he had assaulted this victim on three separate occasions during the two months they dated.

Based on the 2011 assaults, a federal grand jury in Montana indicted Bryant on two counts of domestic assault by a habitual offender, in violation of § 117(a). Bryant was represented in federal court by appointed counsel. Contending that the Sixth Amendment precluded use of his prior, uncounseled, tribal-court misdemeanor convictions to satisfy § 117(a)'s predicate-offense element, Bryant moved to dismiss the indictment. The District Court denied the motion, App. to Pet. for Cert. 32a, and Bryant entered a conditional guilty plea, reserving the right to appeal that decision. Bryant was sentenced to concurrent terms of 46 months' imprisonment on each count, to be followed by three years of supervised release.

The Court of Appeals for the Ninth Circuit reversed the conviction and directed dismissal of the indictment. 769 F. 3d 671 (2014). Bryant's tribal-court convictions were not themselves constitutionally infirm, the Ninth Circuit comprehended, because "the Sixth Amendment right to appointed counsel does not apply in tribal court proceedings." *Id.*, at 675. But, the court continued, had the convictions been obtained in state or federal court, they would have violated the Sixth Amendment because Bryant had received sentences of imprisonment although he lacked the aid of appointed counsel. Adhering to its prior decision in *United States* v. *Ant*, 882 F. 2d 1389 (CA9 1989),[7] the Court of Appeals held that, subject to narrow exceptions not relevant here, "tribal court convictions may be used in subsequent [federal] prosecutions only if the tribal court guarantees a right to counsel that is, at minimum, coextensive with the Sixth Amendment right." 769 F. 3d, at 677. Rejecting the Government's argument that our decision in *Nichols* required the opposite result, the Ninth Circuit concluded that *Nichols* applies only when the prior conviction *did* comport with the Sixth Amendment, *i. e.*, when no sentence of imprisonment was imposed for the prior conviction. 769 F. 3d, at 677–678.

Judge Watford concurred, agreeing that *Ant* controlled the outcome of this case, but urging reexamination of *Ant* in light of *Nichols*. 769 F. 3d, at 679. This Court's decision in *Nichols*, Judge Watford wrote, "undermines the notion that uncounseled convictions are, as a categorical matter, too unreliable to be used as a basis for imposing a prison sentence in a subsequent case." 769 F. 3d, at 679. The Court of Appeals declined to rehear the case en banc over vigorous dissents by Judges Owens and O'Scannlain.

In disallowing the use of an uncounseled tribal-court conviction to establish a prior domestic violence conviction within § 117(a)'s compass, the Ninth Circuit created a Circuit split. The Eighth and Tenth Circuits have both held that tribal-court "convictions, valid at their inception, and not alleged to be otherwise unreliable, may be used to prove the elements of § 117." *United States* v. *Cavanaugh*, 643 F. 3d

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[7] In *United States* v. *Ant*, 882 F. 2d 1389 (1989), the Ninth Circuit proscribed the use of an uncounseled tribal-court guilty plea as evidence of guilt in a subsequent federal prosecution arising out of the same incident. Use of the plea was impermissible, the Court of Appeals reasoned, "because the tribal court guilty plea was made under circumstances which would have violated the United States Constitution were it applicable to tribal proceedings." *Id.*, at 1390.

592, 594 (CA8 2011); see *United States* v. *Shavanaux*, 647 F. 3d 993, 1000 (CA10 2011). To resolve this disagreement, we granted certiorari, 577 U. S. 1048 (2016), and now reverse.

II

Bryant's tribal-court convictions, he recognizes, infringed no constitutional right because the Sixth Amendment does not apply to tribal-court proceedings. Brief for Respondent 5. Those prior convictions complied with ICRA, he concedes, and therefore were valid when entered. But, had his convictions occurred in state or federal court, Bryant observes, *Argersinger* and *Scott* would have rendered them invalid because he was sentenced to incarceration without representation by court-appointed counsel. Essentially, Bryant urges us to treat tribal-court convictions, for § 117(a) purposes, as though they had been entered by a federal or state court. We next explain why we decline to do so.

As earlier recounted, we held in *Nichols* that "an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." 511 U. S., at 749. "Enhancement statutes," we reasoned, "do not change the penalty imposed for the earlier conviction"; rather, repeat-offender laws "penaliz[e] only the last offense committed by the defendant." *Id.*, at 747; see *United States* v. *Rodriquez*, 553 U. S. 377, 386 (2008) ("When a defendant is given a higher sentence under a recidivism statute . . . 100% of the punishment is for the offense of conviction. None is for the prior convictions or the defendant's 'status as a recidivist.' "). *Nichols* thus instructs that convictions valid when entered—that is, those that, when rendered, did not violate the Constitution—retain that status when invoked in a subsequent proceeding.

Nichols' reasoning steers the result here. Bryant's 46-month sentence for violating § 117(a) punishes his most recent acts of domestic assault, not his prior crimes prosecuted in tribal court. Bryant was denied no right to counsel in tribal court, and his Sixth Amendment right was honored in federal court, when he was "adjudicated guilty of the felony offense for which he was imprisoned." *Alabama* v. *Shelton*, 535 U. S. 654, 664 (2002). It would be "odd to say that a conviction untainted by a violation of the Sixth Amendment triggers a violation of that same amendment when it's used in a subsequent case where the defendant's right to appointed counsel is fully respected." 769 F. 3d, at 679 (Watford, J., concurring).[8]

Bryant acknowledges that had he been punished only by fines in his tribal-court proceedings, *Nichols* would have allowed reliance on his uncounseled convictions to satisfy § 117(a)'s prior-crimes predicate. Brief for Respondent 50. We see no cause to distinguish for § 117(a) purposes between valid but uncounseled convictions resulting in a fine and valid but uncounseled convictions resulting in imprisonment not exceeding one year. "Both Nichols's and Bryant's uncounseled convictions 'comport' with the Sixth Amendment, and for *the same reason*: the Sixth Amendment right to appointed counsel did not apply to either conviction." 792 F. 3d, at 1048 (O'Scannlain, J., dissenting from denial of rehearing en banc).

In keeping with *Nichols*, we resist creating a "hybrid" category of tribal-court convictions, "good for the punishment actually imposed but not available for sentence enhancement

[8] True, as Bryant points out, we based our decision in *Nichols* v. *United States*, 511 U. S. 738, 747 (1994), in part on the "less exacting" nature of sentencing, compared with the heightened burden of proof required for determining guilt. But, in describing the rule we adopted, we said that it encompasses both "criminal history provisions," applicable at sentencing, and "recidivist statutes," of which § 117(a) is one. *Ibid.* Moreover, *Nichols*' two primary rationales—the validity of the prior conviction and the sentence's punishment of "only the last offense"—do not rely on a distinction between guilt adjudication and sentencing. Indeed, it is the validity of the prior conviction that distinguishes *Nichols* from *United States* v. *Tucker*, 404 U. S. 443, 448 (1972), in which we found impermissible the use at sentencing of an *invalid*, uncounseled prior conviction.

in a later prosecution." 511 U. S., at 744. *Nichols* indicates that use of Bryant's uncounseled tribal-court convictions in his § 117(a) prosecution did not "transform his prior, valid, tribal court convictions into new, invalid, federal ones." 792 F. 3d, at 1048 (opinion of O'Scannlain, J.).

Our decision in *Burgett*, which prohibited the subsequent use of a conviction obtained in violation of the right to counsel, does not aid Bryant. Reliance on an invalid conviction, *Burgett* reasoned, would cause the accused to "suffe[r] anew from the deprivation of [his] Sixth Amendment right." 389 U. S., at 115. Because a defendant convicted in tribal court suffers no Sixth Amendment violation in the first instance, "[u]se of tribal convictions in a subsequent prosecution cannot violate [the Sixth Amendment] 'anew.'" *Shavanaux*, 647 F. 3d, at 998.

Bryant observes that reliability concerns underlie our right-to-counsel decisions and urges that those concerns remain even if the Sixth Amendment itself does not shelter him. *Scott* and *Nichols*, however, counter the argument that uncounseled misdemeanor convictions are categorically unreliable, either in their own right or for use in a subsequent proceeding. Bryant's recognition that a tribal-court conviction resulting in a fine would qualify as a § 117(a) predicate offense, we further note, diminishes the force of his reliability-based argument. There is no reason to suppose that tribal-court proceedings are less reliable when a sentence of a year's imprisonment is imposed than when the punishment is merely a fine. No evidentiary or procedural variation turns on the sanction—fine only or a year in prison—ultimately imposed.

Bryant also invokes the Due Process Clause of the Fifth Amendment in support of his assertion that tribal-court judgments should not be used as predicate offenses. But, as earlier observed, ICRA itself requires tribes to ensure "due process of law," § 1302(a)(8), and it accords defendants specific procedural safeguards resembling those contained in the Bill of Rights and the Fourteenth Amendment. See *supra*, at 149. Further, ICRA makes habeas review in federal court available to persons incarcerated pursuant to a tribal-court judgment. § 1303. By that means, a prisoner may challenge the fundamental fairness of the proceedings in tribal court. Proceedings in compliance with ICRA, Congress determined, and we agree, sufficiently ensure the reliability of tribal-court convictions. Therefore, the use of those convictions in a federal prosecution does not violate a defendant's right to due process. See *Shavanaux*, 647 F. 3d, at 1000; cf. *State* v. *Spotted Eagle*, 316 Mont. 370, 378–379, 71 P. 3d 1239, 1245–1246 (2003) (principles of comity support recognizing uncounseled tribal-court convictions that complied with ICRA).

* * *

Because Bryant's tribal-court convictions occurred in proceedings that complied with ICRA and were therefore valid when entered, use of those convictions as predicate offenses in a § 117(a) prosecution does not violate the Constitution. We accordingly reverse the judgment of the Court of Appeals for the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice Thomas, concurring.

The Court holds that neither the Sixth Amendment nor the Fifth Amendment's Due Process Clause prohibits the Government from using Michael Bryant's uncounseled tribal-court convictions as predicates for the federal crime of committing a domestic assault within Indian country. *Ante*, at 157; see 18 U. S. C. § 117(a) (making it a federal crime to "commi[t] a domestic assault within . . . Indian country" if the person "has a final conviction on at least 2 separate prior occasions in . . . Indian tribal court proceedings" for domestic assault and similar crimes). Because our precedents dictate that holding, I join the Court's opinion.

The fact that this case arose at all, however, illustrates how far afield our Sixth Amendment and Indian-law precedents have gone. Three basic assumptions underlie this case: that the Sixth Amendment ordinarily bars the Government from introducing, in a later proceeding, convictions obtained in violation of the right to counsel, *ante,* at 150; that tribes' retained sovereignty entitles them to prosecute tribal members in proceedings that are not subject to the Constitution, *ante,* at 149; and that Congress can punish assaults that tribal members commit against each other on Indian land, *ante,* at 147–148. Although our precedents have endorsed these assumptions for decades, the Court has never identified a sound constitutional basis for any of them, and I see none.

Start with the notion that the Sixth Amendment generally prohibits the government from using a prior, uncounseled conviction obtained in violation of the right to counsel as a predicate for a new offense in a new proceeding. *Ante,* at 150. All that the text of the Sixth Amendment requires in a criminal prosecution is that the accused enjoy the "[a]ssistance of [c]ounsel" in *that* proceeding. The Court was likely wrong in *Burgett* v. *Texas,* 389 U. S. 109 (1967), when it created a Sixth Amendment "exclusionary rule" that prohibits the government from using prior convictions obtained in violation of the right to counsel in subsequent proceedings to avoid "erod[ing] the principle" of the right to counsel. *Id.,* at 115. I would be open to reconsidering *Burgett* in a future case.

The remaining two assumptions underpinning this case exemplify a central tension within our Indian-law jurisprudence. On the one hand, the only reason why tribal courts had the power to convict Bryant in proceedings where he had no right to counsel is that such prosecutions are a function of a tribe's core sovereignty. See *United States* v. *Lara,* 541 U. S. 193, 197 (2004); *United States* v. *Wheeler,* 435 U. S. 313, 318, 322–323 (1978). By virtue of tribes' status as " 'separate sovereigns pre-existing the Constitution,' " tribal prosecutions need not, under our precedents, comply with " 'those constitutional provisions framed specifically as limitations on federal or state authority.' " *Ante,* at 149 (quoting *Santa Clara Pueblo* v. *Martinez,* 436 U. S. 49, 56 (1978)).

On the other hand, the validity of Bryant's ensuing federal conviction rests upon a contrary view of tribal sovereignty. Congress ordinarily lacks authority to enact a general federal criminal law proscribing domestic abuse. See *United States* v. *Morrison,* 529 U. S. 598, 610–613 (2000). But, the Court suggests, Congress must intervene on reservations to ensure that prolific domestic abusers receive sufficient punishment. See *ante,* at 145–147. The Court does not explain where Congress' power to act comes from, but our precedents leave no doubt on this score. Congress could make Bryant's domestic assaults a federal crime subject to federal prosecution only because our precedents have endowed Congress with an "all-encompassing" power over all aspects of tribal sovereignty. *Wheeler, supra,* at 319. Thus, even though tribal prosecutions of tribal members are purportedly the apex of tribal sovereignty, Congress can second-guess how tribes prosecute domestic abuse perpetrated by Indians against other Indians on Indian land by virtue of its "plenary power" over Indian tribes. See *United States* v. *Kagama,* 118 U. S. 375, 382–384 (1886); accord, *Lara,* 541 U. S., at 200.

I continue to doubt whether either view of tribal sovereignty is correct. See *id.,* at 215 (THOMAS, J., concurring in judgment). Indian tribes have varied origins, discrete treaties with the United States, and different patterns of assimilation and conquest. In light of the tribes' distinct histories, it strains credulity to assume that all tribes necessarily retained the sovereign prerogative of prosecuting their own members. And by treating all tribes as possessing an identical quantum of sovereignty, the Court's precedents have made it all but impossible to understand the ultimate source of each tribe's sovereignty and whether it endures. See

Prakash, Against Tribal Fungibility, 89 Cornell L. Rev. 1069, 1070–1074, 1107–1110 (2004).

Congress' purported plenary power over Indian tribes rests on even shakier foundations. No enumerated power—not Congress' power to "regulate Commerce . . . with Indian Tribes," not the Senate's role in approving treaties, nor anything else—gives Congress such sweeping authority. See *Lara, supra,* at 224–225 (THOMAS, J., concurring in judgment); *Adoptive Couple* v. *Baby Girl,* 570 U. S. 637, 659–665 (2013) (THOMAS, J., concurring). Indeed, the Court created this new power because it was unable to find an enumerated power justifying the federal Major Crimes Act, which for the first time punished crimes committed by Indians against Indians on Indian land. See *Kagama, supra,* at 377–380; cf. *ante,* at 147. The Court asserted: "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection . . . . It must exist in that government, because it has never existed anywhere else." *Kagama, supra,* at 384. Over a century later, *Kagama* endures as the foundation of this doctrine, and the Court has searched in vain for any valid constitutional justification for this unfettered power. See, *e. g., Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 566–567 (1903) (relying on *Kagama*'s race-based plenary power theory); *Winton* v. *Amos,* 255 U. S. 373, 391–392 (1921) (Congress' "plenary authority" is based on Indians' "condition of tutelage or dependency"); *Wheeler, supra,* at 319 (*Winton* and *Lone Wolf* illustrate the "undisputed fact that Congress has plenary authority" over tribes); *Lara, supra,* at 224 (THOMAS, J., concurring in judgment) ("The Court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty").

It is time that the Court reconsider these precedents. Until the Court ceases treating all Indian tribes as an undifferentiated mass, our case law will remain bedeviled by amorphous and ahistorical assumptions about the scope of tribal sovereignty. And, until the Court rejects the fiction that Congress possesses plenary power over Indian affairs, our precedents will continue to be based on the paternalistic theory that Congress must assume all-encompassing control over the "remnants of a race" for its own good. *Kagama*, *supra*, at 384.

Syllabus

KINGDOMWARE TECHNOLOGIES, INC. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 14–916. Argued February 22, 2016—Decided June 16, 2016

The Veterans Benefits, Health Care, and Information Technology Act of 2006 requires the Secretary of Veterans Affairs to set annual goals for contracting with service-disabled and other veteran-owned small businesses. 38 U. S. C. § 8127(a). To help reach those goals, a separate set-aside provision known as the "Rule of Two" provides that a contracting officer "shall award contracts" by restricting competition to veteran-owned small businesses if the officer reasonably expects that at least two such businesses will submit offers and that "the award can be made at a fair and reasonable price that offers best value to the United States." § 8127(d). Two exceptions provide that the contracting officer "may" use noncompetitive and sole-source contracts for contracts below specific dollar amounts. §§ 8127(b), (c).

In 2012, the Department procured an emergency-notification service for four medical centers for a 1-year period, with an option to extend the agreement for two more, from a non-veteran-owned business. The Department did so through the Federal Supply Schedule (FSS), a streamlined method that allows Government agencies to acquire particular goods and services under prenegotiated terms. After the initial year, the Department exercised its option for an additional year, and the agreement ended in 2013.

Petitioner Kingdomware Technologies, Inc., a service-disabled veteran-owned small business, filed a bid protest with the Government Accountability Office (GAO), alleging that the Department procured multiple contracts through the FSS without employing the Rule of Two. The GAO determined that the Department's actions were unlawful, but when the Department declined to follow the GAO's nonbinding recommendation, Kingdomware filed suit, seeking declaratory and injunctive relief. The Court of Federal Claims granted summary judgment to the Government, and the Federal Circuit affirmed, holding that the Department was only required to apply the Rule of Two when necessary to satisfy its annual goals.

Held:

1. This Court has jurisdiction to reach the merits of this case. For a federal court to have Article III jurisdiction "an actual controversy

must exist . . . through all stages of the litigation." *Already, LLC* v. *Nike, Inc.*, 568 U. S. 85, 90–91. Here, no court is capable of granting petitioner relief initially sought in the complaint because the short-term FSS contracts have been completed by other contractors. However, the controversy is "'capable of repetition, yet evading review.'" *Spencer* v. *Kemna*, 523 U. S. 1, 17. The procurements were fully performed in less than two years after they were awarded, and it is reasonable to expect that the Government will refuse to apply the Rule of Two in a future bid by Kingdomware. Pp. 169–170.

2. Section 8127(d)'s contracting procedures are mandatory and apply to all of the Department's contracting determinations. Pp. 171–175.

(a) Section 8127(d)'s text unambiguously requires the Department to use the Rule of Two before contracting under the competitive procedures. The word "shall" usually connotes a requirement, unlike the word "may," which implies discretion. Compare *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U. S. 26, 35, with *United States* v. *Rodgers*, 461 U. S. 677, 706. The use of the word "may" in §§ 8127(b) and (c) confirms this reading; for when a statute distinguishes between "may" and "shall," the latter generally imposes a mandatory duty. Pp. 171–172.

(b) Alternative readings of § 8127(d) are unpersuasive. First, § 8127(d)'s prefatory clause, which declares that the Rule of Two is designed "for the purposes of" meeting § 8127(a)'s annual contracting goals, has no bearing on whether § 8127(d)'s requirement is mandatory or discretionary. The prefatory clause's announcement of an objective does not change the operative clause's plain meaning. See *Yazoo & Mississippi Valley R. Co.* v. *Thomas*, 132 U. S. 174, 188. Second, an FSS order is a "contract" within the ordinary meaning of that term; thus, FSS orders do not fall outside § 8127(d), which applies when the Department "award[s] contracts." Third, to say that the Rule of Two will hamper mundane Government purchases misapprehends current FSS practices, which have expanded well beyond simple procurement to, as in this case, contracts concerning complex information technology services over a multiyear period. Finally, because the mandate § 8127(d) imposes is unambiguous, this Court declines the invitation to defer to the Department's declaration that § 8127 procedures are inapplicable to FSS orders. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843. Pp. 172–175.

754 F. 3d 923, reversed and remanded.

Thomas, J., delivered the opinion for a unanimous Court.

Thomas G. Saunders argued the cause for petitioner. With him on the briefs were *Seth P. Waxman, Amy K. Wigmore, Gregory H. Petkoff, Joseph Gay, Matthew Guarnieri,* and *Jason D. Hirsch.*

Zachary D. Tripp argued the cause for the United States. With him on the briefs were *Solicitor General Verrilli, Principal Deputy Assistant Attorney General Mizer, Deputy Solicitor General Stewart,* and *Robert C. Bigler.**

JUSTICE THOMAS delivered the opinion of the Court.

Petitioner Kingdomware Technologies, Inc., a veteran-owned small business, unsuccessfully vied for a federal contract from the Department of Veterans Affairs to provide emergency-notification services. Kingdomware sued, arguing that the Department violated a federal law providing that it "shall award" contracts to veteran-owned small businesses when there is a "reasonable expectation" that two or more such businesses will bid for the contract at "a fair and reasonable price that offers best value to the United States." 38 U. S. C. § 8127(d). This provision is known as the Rule of Two.

In this case, we consider whether the Department must use the Rule of Two every time it awards contracts or whether it must use the Rule of Two only to the extent necessary to meet annual minimum goals for contracting with veteran-owned small businesses. We conclude that the Department must use the Rule of Two when awarding con-

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*Briefs of *amici curiae* urging reversal were filed for the American Legion by *Andrew C. Nichols, Steffen N. Johnson,* and *Linda T. Coberly*; for the Federal Circuit Bar Association by *Cyrus E. Phillips IV* and *Edgar H. Haug*; for Iraq and Afghanistan Veterans of America by *C. Peter Dungan*; for Members of Congress by *Jessica Ring Amunson, Damien C. Specht,* and *R. Trent McCotter*; for the National Veteran Small Business Coalition et al. by *Luke P. McLoughlin, Robert L. Byer,* and *Kristina C. Kelly*; and for Paralyzed Veterans of America et al. by *Paul J. Zidlicky* and *Donald H. Smith.*

Steven J. Koprince, pro se, filed a brief as *amicus curiae.*

tracts, even when the Department will otherwise meet its annual minimum contracting goals.

I

This case concerns the interplay between several federal statutes governing federal procurement.

A

In an effort to encourage small businesses, Congress has mandated that federal agencies restrict competition for some federal contracts. The Small Business Act thus requires many federal agencies, including the Department of Veterans Affairs, to set aside contracts to be awarded to small businesses. The Act requires each agency to set "an annual goal that presents, for that agency, the maximum practicable opportunity" for contracting with small businesses, including those "small business concerns owned and controlled by service-disabled veterans." 15 U. S. C. § 644(g)(1)(B). And federal regulations set forth procedures for most agencies to "set aside" contracts for small businesses. See, *e. g.*, 48 CFR § 19.502–2(b) (2015).

In 1999, Congress expanded small-business opportunities for veterans by passing the Veterans Entrepreneurship and Small Business Development Act, 113 Stat. 233. That Act established a 3% governmentwide contracting goal for contracting with service-disabled veteran-owned small businesses. 15 U. S. C. § 644(g)(1)(A)(ii).

When the Federal Government continually fell behind in achieving these goals, Congress tried to correct the situation. Relevant here, Congress enacted the Veterans Benefits, Health Care, and Information Technology Act of 2006, §§ 502, 503, 120 Stat. 3431–3436 (codified, as amended, at 38 U. S. C. §§ 8127, 8128). That Act requires the Secretary of Veterans Affairs to set more specific annual goals that encourage contracting with veteran-owned and service-disabled veteran-owned small businesses. § 8127(a). The

Act's "Rule of Two," at issue here, provides that the Department "shall award" contracts by restricting competition for the contract to service-disabled or other veteran-owned small businesses. To restrict competition under the Act, the contracting officer must reasonably expect that at least two of these businesses will submit offers and that "the award can be made at a fair and reasonable price that offers best value to the United States." § 8127(d).[1]

Congress provided two exceptions to the Rule. Under those exceptions, the Department may use noncompetitive and sole-source contracts when the contracts are below specific dollar amounts. Under § 8127(b), a contracting officer "may use procedures other than competitive procedures" to award contracts to veteran-owned small businesses when the goods or services that are the subject of such contracts are worth less than the simplified acquisition threshold. 38 U. S. C. § 8127(b); 41 U. S. C. § 134 (establishing a " 'simplified acquisition threshold' " of $100,000); see also § 1908 (authorizing adjustments for inflation); 75 Fed. Reg. 53130 (codified at 48 CFR § 2.101 (2010)) (raising the amount to $150,000). And under 38 U. S. C. § 8127(c), a contracting officer "may award a contract to a [veteran-owned small business] using procedures other than competitive procedures" if the contract is worth more than the simplified acquisition threshold but less than $5 million, the contracting officer determines that the business is "a responsible source with respect to performance of such contract opportunity," and the award

[1] This provision reads in full:

"Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States." 38 U. S. C. § 8127(d).

can be made at "a fair and reasonable price." 38 U. S. C. § 8127(c).

In finalizing its regulations meant to implement the Act, the Department stated in a preamble that § 8127's procedures "do not apply to [Federal Supply Schedule] task or delivery orders." VA Acquisition Regulation, 74 Fed. Reg. 64624 (2009). The Federal Supply Schedule (FSS) generally is a streamlined method for Government agencies to acquire certain supplies and services in bulk, such as office supplies or food equipment. 48 CFR § 8.402(a) (2015). Instead of the normal bidding process for each individual order, FSS contracts are ordinarily prenegotiated between outside vendors and the General Services Administration, which negotiates on behalf of various Government agencies. See § 8.402(b); *Sharp Electronics Corp.* v. *McHugh*, 707 F. 3d 1367, 1369 (CA Fed. 2013). Under FSS contracts, businesses agree to provide "[i]ndefinite delivery" of particular goods or services "at stated prices for given periods of time." § 8.402(a). Agencies receive a list of goods and services available through the FSS. Because the terms of purchasing these goods and services have already been negotiated, contracting officers can acquire these items and services simply by issuing purchase orders.

B

Kingdomware Technologies, Inc., is a service-disabled veteran-owned small business. Around January 2012, the Department decided to procure an emergency-notification service for four medical centers.[2] In an emergency, this service sends important information to Department personnel. The Department sent a request for a price quotation to a non-veteran-owned company through the FSS system. That company responded with a favorable price, which the

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[2] We use "Department" when referring to the Government as a party in this litigation.

Department accepted around February 22, 2012. The agreement was for one year, with an option to extend the agreement for two more. The Department exercised the one option to extend the time, and performance was completed in May 2013. Decl. of Corydon Ford Heard III ¶8.

Kingdomware challenged the Department's decision to award the contract to a non-veteran-owned company by filing a bid protest with the Government Accountability Office (GAO). See 31 U. S. C. § 3552(a). Kingdomware alleged that the Department procured multiple contracts through the FSS without restricting competition using the Rule of Two, as required by § 8127. Kingdomware contended that the Department could not award the contracts at issue here without first checking to see whether at least two veteran-owned small businesses could perform the work at a fair and reasonable price. The GAO issued a nonbinding determination that the Department's failure to employ the Rule of Two was unlawful and recommended that the Department conduct market research to determine whether there were two veteran-owned businesses that could fulfill the procurement. The Department disagreed with the recommendation.

Petitioner then filed suit in the Court of Federal Claims and sought declaratory and injunctive relief.[3] The Court of Federal Claims granted summary judgment to the Department. 107 Fed. Cl. 226 (2012).

A divided panel of the Federal Circuit affirmed. 754 F. 3d 923 (2014). In the majority's view, § 8127 did not require the Department to use the Rule of Two in all contracting. *Id.*, at 933–934. Instead, the court concluded, mandatory application of the Rule of Two was limited to contracts necessary

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[3] Petitioner's complaint additionally stated claims for two other bid protests. To simplify the proceedings, the parties entered into a joint stipulation of facts concerning only the one bid protest described above. The details concerning the two other disputed bids are relevant only for mootness analysis since the work related to both bids has been performed. See Part II, *infra*.

to fulfill its statutory purpose—to provide a means of satisfying the Department's annual contracting goals described in § 8127(a). *Id.*, at 934. Thus, so long as those goals were satisfied, the Court of Appeals concluded, the Department need not apply the Rule of Two any further. *Ibid.* Judge Reyna dissented, arguing that § 8127 employs mandatory language that "could not be clearer" in requiring the Department to apply the Rule of Two in every instance of contracting. *Id.*, at 935.

We granted certiorari to decide whether § 8127(d) requires the Department to apply the Rule of Two in all contracting, or whether the statute gives the Department some discretion in applying the rule. 576 U. S. 1034 (2015).

II

Before we reach the merits, we must assess our jurisdiction. Article III of the Constitution limits federal courts to deciding "Cases" and "Controversies," and "an actual controversy must exist not only at the time the complaint is filed, but through all stages of the litigation." *Already, LLC* v. *Nike, Inc.*, 568 U. S. 85, 90–91 (2013) (internal quotation marks omitted).

Here, no live controversy in the ordinary sense remains because no court is now capable of granting the relief petitioner seeks. When Kingdomware filed this suit four years ago, it sought a permanent injunction and declaratory relief with respect to a particular procurement. The services at issue in that procurement were completed in May 2013. And the two earlier procurements, which Kingdomware had also protested, were complete in September 2012. See Decl. of Corydon Ford Heard III ¶¶6–8. As a result, no court can enjoin further performance of those services or solicit new bids for the performance of those services. And declaratory relief would have no effect here with respect to the present procurements because the services have already been rendered.

Although a case would generally be moot in such circumstances, this Court's precedents recognize an exception to the mootness doctrine for a controversy that is " 'capable of repetition, yet evading review.' " *Spencer* v. *Kemna*, 523 U. S. 1, 17 (1998). That exception applies "only in exceptional situations," where (1) "the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration," and (2) "there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again." *Ibid.* (internal quotation marks omitted; brackets in original).

That exception applies to these short-term contracts. First, the procurements were fully performed in less than two years after they were awarded. We have previously held that a period of two years is too short to complete judicial review of the lawfulness of the procurement. See *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 514–516 (1911). Second, it is reasonable to expect that the Department will refuse to apply the Rule of Two in a future procurement for the kind of services provided by Kingdomware. If Kingdomware's interpretation of § 8127(d) is correct, then the Department must use restricted competition rather than procure on the open market. And Kingdomware, which has been awarded many previous contracts, has shown a reasonable likelihood that it would be awarded a future contract if its interpretation of § 8127(d) prevails. See Decl. of Corydon Ford Heard III ¶¶11–15 (explaining that the company continues to bid on similar contracts). Thus, we have jurisdiction because the same legal issue in this case is likely to recur in future controversies between the same parties in circumstances where the period of contract performance is too short to allow full judicial review before performance is complete. Our interpretation of § 8127(d)'s requirements in this case will govern the Department's future contracting.

III

On the merits, we hold that § 8127 is mandatory, not discretionary. Its text requires the Department to apply the Rule of Two to all contracting determinations and to award contracts to veteran-owned small businesses. The Act does not allow the Department to evade the Rule of Two on the ground that it has already met its contracting goals or on the ground that the Department has placed an order through the FSS.

A

In statutory construction, we begin "with the language of the statute." *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438, 450 (2002). If the statutory language is unambiguous and "the statutory scheme is coherent and consistent"—as is the case here—"[t]he inquiry ceases." *Ibid.*

We hold that § 8127(d) unambiguously requires the Department to use the Rule of Two before contracting under the competitive procedures. Section 8127(d) requires that "a contracting officer of the Department *shall* award contracts" to veteran-owned small businesses using restricted competition whenever the Rule of Two is satisfied, "[e]xcept as provided in subsections (b) and (c)." (Emphasis added.) Subsections (b) and (c) provide, in turn, that the Department "may" use noncompetitive procedures and sole-source contracts for lower value acquisitions. §§ 8127(b), (c). Except when the Department uses the noncompetitive and sole-source contracting procedures in subsections (b) and (c), § 8127(d) requires the Department to use the Rule of Two before awarding a contract to another supplier. The text also has no exceptions for orders from the FSS system.

Congress' use of the word "shall" demonstrates that § 8127(d) mandates the use of the Rule of Two in all contracting before using competitive procedures. Unlike the word "may," which implies discretion, the word "shall" usually connotes a requirement. Compare *Lexecon Inc.* v. *Milberg*

Weiss Bershad Hynes & Lerach, 523 U. S. 26, 35 (1998) (recognizing that "shall" is "mandatory" and "normally creates an obligation impervious to judicial discretion"), with *United States* v. *Rodgers*, 461 U. S. 677, 706 (1983) (explaining that "[t]he word 'may,' when used in a statute, usually implies some degree of discretion"). Accordingly, the Department *shall* (or *must*) prefer veteran-owned small businesses when the Rule of Two is satisfied.

The surrounding subsections of § 8127 confirm that Congress used the word "shall" in § 8127(d) as a command. Like § 8127(d), both § 8127(b) and § 8127(c) provide special procedures "[f]or purposes of meeting the goals under [§ 8127(a)]." §§ 8127(b), (c). But, in contrast to § 8127(d), those latter two provisions state that "a contracting officer of the Department *may* use" (or, for § 8127(c), "*may* award") such contracts. §§ 8127(b), (c) (emphasis added). When a statute distinguishes between "may" and "shall," it is generally clear that "shall" imposes a mandatory duty. See *United States ex rel. Siegel* v. *Thoman*, 156 U. S. 353, 359–360 (1895). We see no reason to depart from the usual inference here.

We therefore hold that, before contracting with a non-veteran-owned business, the Department must first apply the Rule of Two.[4]

B

The Federal Circuit and the Department offered several reasons for their alternative reading of § 8127(d) as a discretionary provision that the Department can disregard for at least some contracting decisions. We disagree with them.

To hold that § 8127(d) is discretionary, the Federal Circuit relied on § 8127(d)'s prefatory clause. 754 F. 3d, at 933.

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[4] We need not decide today precisely what sort of search for veteran-owned small businesses the Department must conduct to comply with the Rule of Two. We do not decide, for example, whether the Department may satisfy its obligations by searching for eligible veteran-owned small businesses within the FSS, or whether it must conduct a broader search for such businesses.

That clause declares that the Rule of Two is designed "for the purposes of" meeting the annual contracting goals that the Department is required to set under § 8127(a). The Department originally made a similar argument before changing arguments in its briefing on the merits. Compare Brief in Opposition 13–15 with Brief for United States 24–25.

But the prefatory clause has no bearing on whether § 8127(d)'s requirement is mandatory or discretionary. The clause announces an objective that Congress hoped that the Department would achieve and charges the Secretary with setting annual benchmarks, but it does not change the plain meaning of the operative clause, § 8127(d). See *Yazoo & Mississippi Valley R. Co.* v. *Thomas*, 132 U. S. 174, 188 (1889) (explaining that prefatory clauses or preambles cannot change the scope of the operative clause).

The Federal Circuit's interpretation also would produce an anomaly. If the Federal Circuit's understanding of § 8127(d)'s prefatory clause were correct, then §§ 8127(b) and (c), which also contain "[f]or purposes of meeting the goals" clauses, would cease to apply once the Department meets the Secretary's goal, and the Department would be required to return to competitive bidding. If we interpreted the "purposes" clause of § 8127(d) to mean that its mandate no longer applies if the goals are met, then the identical "purposes" clauses of §§ 8127(b) and (c) would also render those clauses' permissive mandates inapplicable. This would require the Department, once the goals are met, to award bids using the default contracting procedures rather than to use the noncompetitive and single-source provisions in §§ 8127(b) and (c).

Second, the Department argues that the mandatory provision does not apply to "orders" under "pre-existing FSS contracts." Brief for United States 25. The Department failed to raise this argument in the courts below, and we normally decline to entertain such forfeited arguments. See *OBB Personenverkehr AG* v. *Sachs*, 577 U. S. 27, 37–38 (2015). But the Department's forfeited argument fails in any event. Section 8127(d) applies when the Department "award[s] contracts." When the Department places an FSS order, that order creates contractual obligations for each party and is a "contract" within the ordinary meaning of that term. See, *e. g.*, Black's Law Dictionary 389 (10th ed. 2014) ("[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law"). It also creates a "contract" as defined by federal regulations, namely, a "mutually binding legal relationship obligating the seller to furnish the supplies or services . . . and the buyer to pay for them," including "all types of commitments that obligate the Government to an expenditure of appropriated funds and" (as a general matter) "are in writing." 48 CFR § 2.101 (2015). An FSS order creates mutually binding obligations: for the contractor, to supply certain goods or services, and for the Government, to pay. The placement of the order creates a new contract; the underlying FSS contract gives the Government the option to buy, but it does not require the Government to make a purchase or expend funds. Further confirming that FSS orders are contracts, the Government is not completely bound by the FSS contract's terms; to the contrary, when placing orders, agencies may sometimes seek different terms than are listed in the FSS. See § 8.405–4 (permitting agencies to negotiate some new terms, such as requesting "a price reduction," when ordering from the FSS).

Third, the Department contends that our interpretation fails to appreciate the distinction between FSS orders and contracts. The Department maintains that FSS orders are only for simplified acquisitions, and that using the Rule of Two for these purchases will hamper mundane purchases like "griddles or food slicers." Brief for United States 21.

But this argument understates current practices under the FSS. The Department has expanded use of the FSS well beyond simple procurement. See Brief for Iraq and Afghanistan Veterans of America as *Amicus Curiae* 14–16. This case proves the point: The contract at issue here concerned complex information technology services over a multiyear period. Moreover, the Department may continue to purchase items that cost less than the simplified acquisition threshold (currently $150,000) through the FSS, if the Department procures them from a veteran-owned small business. See 38 U. S. C. § 8127(b).

Finally and relatedly, the Department asks us to defer to its interpretation that FSS "orders" are not "contracts." See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843–844 (1984) (establishing deference to an agency's interpretation of an ambiguous statute). Even assuming, *arguendo*, that the preamble to the agency's rulemaking could be owed *Chevron* deference, we do not defer to the agency when the statute is unambiguous. See *id.*, at 842–843. For the reasons already given, the text of § 8127(d) clearly imposes a mandatory duty. Thus, we decline the Department's invitation to defer to its interpretation.

* * *

We hold that the Rule of Two contracting procedures in § 8127(d) are not limited to those contracts necessary to fulfill the Secretary's goals under § 8127(a). We also hold that § 8127(d) applies to orders placed under the FSS. The judgment of the Court of Appeals for the Federal Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

UNIVERSAL HEALTH SERVICES, INC. *v.* UNITED STATES ET AL. EX REL. ESCOBAR ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 15–7. Argued April 19, 2016—Decided June 16, 2016

Yarushka Rivera, a teenage beneficiary of Massachusetts' Medicaid program, received counseling services for several years at Arbour Counseling Services, a satellite mental health facility owned and operated by a subsidiary of petitioner Universal Health Services, Inc. She had an adverse reaction to a medication that a purported doctor at Arbour prescribed after diagnosing her with bipolar disorder. Her condition worsened, and she eventually died of a seizure. Respondents, her mother and stepfather, later discovered that few Arbour employees were actually licensed to provide mental health counseling or authorized to prescribe medications or offer counseling services without supervision.

Respondents filed a *qui tam* suit, alleging that Universal Health had violated the False Claims Act (FCA). That Act imposes significant penalties on anyone who "knowingly presents . . . a false or fraudulent claim for payment or approval" to the Federal Government, 31 U. S. C. § 3729(a)(1)(A). Respondents sought to hold Universal Health liable under what is commonly referred to as an "implied false certification theory of liability," which treats a payment request as a claimant's implied certification of compliance with relevant statutes, regulations, or contract requirements that are material conditions of payment and treats a failure to disclose a violation as a misrepresentation that renders the claim "false or fraudulent." Specifically, respondents alleged, Universal Health (acting through Arbour) defrauded the Medicaid program by submitting reimbursement claims that made representations about the specific services provided by specific types of professionals, but that failed to disclose serious violations of Massachusetts Medicaid regulations pertaining to staff qualifications and licensing requirements for these services. Universal Health thus allegedly defrauded the program because Universal Health knowingly misrepresented its compliance with mental health facility requirements that are so central to the provision of mental health counseling that the Medicaid program would have refused to pay these claims had it known of these violations.

The District Court granted Universal Health's motion to dismiss. It held that respondents had failed to state a claim under the "implied false certification" theory of liability because none of the regulations violated by Arbour was a condition of payment. The First Circuit reversed in relevant part, holding that every submission of a claim implicitly represents compliance with relevant regulations, and that any undisclosed violation of a precondition of payment (whether or not expressly identified as such) renders a claim "false or fraudulent." The First Circuit further held that the regulations themselves provided conclusive evidence that compliance was a material condition of payment because the regulations expressly required facilities to adequately supervise staff as a condition of payment.

Held:

1. The implied false certification theory can be a basis for FCA liability when a defendant submitting a claim makes specific representations about the goods or services provided, but fails to disclose noncompliance with material statutory, regulatory, or contractual requirements that make those representations misleading with respect to those goods or services. Pp. 186–190.

(a) The FCA does not define a "false" or "fraudulent" claim, so the Court turns to the principle that "absent other indication, 'Congress intends to incorporate the well-settled meaning of the common-law terms it uses,'" *Sekhar* v. *United States*, 570 U. S. 729, 732. Under the common-law definition of "fraud," the parties agree, certain misrepresentations by omission can give rise to FCA liability. Respondents and the Government contend that every claim for payment implicitly represents that the claimant is legally entitled to payment, and that failing to disclose violations of material legal requirements renders the claim misleading. Universal Health, on the other hand, argues that submitting a claim involves no representations and that the nondisclosure of legal violations is not actionable absent a special duty of reasonable care to disclose such matters. Today's decision holds that the claims at issue may be actionable because they do more than merely demand payment; they fall squarely within the rule that representations that state the truth only so far as it goes, while omitting critical qualifying information, can be actionable misrepresentations. Pp. 186–189.

(b) By submitting claims for payment using payment codes corresponding to specific counseling services, Universal Health represented that it had provided specific types of treatment. And Arbour staff allegedly made further representations by using National Provider Identification numbers corresponding to specific job titles. By conveying this information without disclosing Arbour's many violations of basic staff and licensing requirements for mental health facilities, Universal Health's claims constituted misrepresentations. Pp. 189–190.

2. Contrary to Universal Health's contentions, FCA liability for failing to disclose violations of legal requirements does not turn upon whether those requirements were expressly designated as conditions of payment. Pp. 190–196.

(a) Section 3729(a)(1)(A), which imposes liability on those presenting "false or fraudulent claim[s]," does not limit claims to misrepresentations about express conditions of payment. Nothing in the text supports such a restriction. And under the Act's materiality requirement, statutory, regulatory, and contractual requirements are not automatically material, even if they are labeled conditions of payment. Nor is the restriction supported by the Act's scienter requirement. A defendant can have "actual knowledge" that a condition is material even if the Government does not expressly call it a condition of payment. What matters is not the label that the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision. Universal Health's policy arguments are unavailing, and are amply addressed through strict enforcement of the FCA's stringent materiality and scienter provisions. Pp. 190–192.

(b) A misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision in order to be actionable under the FCA. The FCA's materiality requirement is demanding. An undisclosed fact is material if, for instance, "[n]o one can say with reason that the plaintiff would have signed this contract if informed of the likelihood" of the undisclosed fact. *Junius Constr. Co.* v. *Cohen*, 257 N. Y. 393, 400, 178 N. E. 672, 674. When evaluating the FCA's materiality requirement, the Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive. A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular requirement as a condition of payment. Nor is the Government's option to decline to pay if it knew of the defendant's noncompliance sufficient for a finding of materiality. Materiality also cannot be found where noncompliance is minor or insubstantial. Moreover, if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. The FCA thus does not support the Government's and First Circuit's expansive view that any statutory, regulatory, or contractual violation is material so long as the defendant knows that the Government would be entitled to refuse payment were it aware of the violation. Pp. 192–196.

780 F. 3d 504, vacated and remanded.

THOMAS, J., delivered the opinion for a unanimous Court.

Roy T. Englert, Jr., argued the cause for petitioner. With him on the briefs were *Gary A. Orseck*, *Mark T. Stancil*, *Michael L. Waldman*, *Donald Burke*, *Mark W. Pearlstein*, *Laura McLane*, and *M. Miller Baker*.

David C. Frederick argued the cause for respondents. With him on the brief were *Derek T. Ho*, *Thomas M. Greene*, *Michael Tabb*, and *Elizabeth Cho*.

Deputy Solicitor General Stewart argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Verrilli*, *Principal Deputy Assistant Attorney General Mizer*, *Allon Kedem*, *Douglas N. Letter*, *Michael S. Raab*, and *Charles W. Scarborough*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Health Care Association et al. by *James F. Segroves* and *Kelly A. Carroll*; for the American Hospital Association et al. by *Jonathan L. Disenhaus*, *Jessica L. Ellsworth*, and *Frank Trinity*; for the American Medical Association et al. by *Philip S. Goldberg*, *Cary Silverman*, and *Robert J. McCully*; for the Association of Private Sector Colleges and Universities by *Douglas R. Cox* and *Lucas C. Townsend*; for CareSource by *Anne Marie Sferra*, *James F. Flynn*, and *Mark R. Chilson*; for Catholic Charities of the Diocese of Joliet, Inc., by *Brian J. Murray*, *Kenton J. Skarin*, and *Thomas Brejcha*; for the Chamber of Commerce of the United States of America et al. by *John P. Elwood*, *Craig D. Margolis*, *Jeremy C. Marwell*, *Tirzah S. Lollar*, and *Kathryn Comerford Todd*; for the Coalition for Government Procurement by *Allyson N. Ho*; for CTIA—The Wireless Association by *Andrew J. Pincus*, *Paul W. Hughes*, and *Thomas C. Power*; for the Generic Pharmaceutical Association by *William M. Jay* and *Jaime A. Santos*; for Interested Healthcare Providers by *Paul E. Kalb*, *Brian P. Morrissey*, *Joshua J. Fougere*, and *Scott D. Stein*; for the National Association of Criminal Defense Lawyers by *James C. Martin*, *Colin E. Wrabley*, and *Jeffrey T. Green*; for the Pharmaceutical Research and Manufacturers of America et al. by *David W. Ogden*, *Jonathan G. Cedarbaum*, *Matthew Guarnieri*, *James M. Spears*, and *Melissa B. Kimmel*; and for the Washington Legal Foundation by *Richard A. Samp*.

Briefs of *amici curiae* urging affirmance were filed for the State of Illinois by *Lisa Madigan*, Attorney General of Illinois, *Carolun E. Shapiro*, Solicitor General, *Harpreet Khera*, Assistant Attorney General, and

Justice Thomas delivered the opinion of the Court.

The False Claims Act, 31 U. S. C. § 3729 *et seq.*, imposes significant penalties on those who defraud the Government. This case concerns a theory of False Claims Act liability commonly referred to as "implied false certification." According to this theory, when a defendant submits a claim, it impliedly certifies compliance with all conditions of payment. But if that claim fails to disclose the defendant's violation of a material statutory, regulatory, or contractual requirement, so the theory goes, the defendant has made a misrepresentation that renders the claim "false or fraudulent" under § 3729(a)(1)(A). This case requires us to consider this theory of liability and to clarify some of the circumstances in which the False Claims Act imposes liability.

Brett E. Legner, Deputy Solicitor General, and by the Attorneys General for their respective States as follows: *Craig W. Richards* of Alaska, *George Jepsen* of Connecticut, *Douglas S. Chin* of Hawaii, *Gregory F. Zoeller* of Indiana, *Tom Miller* of Iowa, *Andy Beshear* of Kentucky, *Brian E. Frosh* of Maryland, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Doug Peterson* of Nebraska, *Joseph A. Foster* of New Hampshire, *Hector Balderas* of New Mexico, *Eric T. Schneiderman* of New York, *Roy Cooper* of North Carolina, *Ellen F. Rosenblum* of Oregon, *Peter F. Kilmartin* of Rhode Island, *Marty J. Jackley* of South Dakota, *Herbert H. Slattery III* of Tennessee, *William H. Sorrell* of Vermont, *Mark R. Herring* of Virginia, and *Bob Ferguson* of Washington; for the Commonwealth of Massachusetts by *Maura Healy*, Attorney General of Massachusetts, *Elizabeth N. Dewar*, Assistant State Solicitor, and *Steven Sharobem*, *Julia Smith*, and *Robert Patten*, Assistant Attorneys General; for AARP by *Kelly Bagby* and *William Alvarado Rivera*; for the Judge David L. Bazelon Center for Mental Health Law et al. by *Claire Prestel*, *Daniel M. Rosenthal*, *Judith A. Scott*, and *Nicole G. Berner*; for Law Professors by *David S. Stone* and *Robert A. Magnanini*; for the National Whistleblowers Center by *Stephen M. Kohn*, *Michael D. Kohn*, and *David K. Colapinto*; for Sen. Charles E. Grassley by *Robert L. King*; for the Taxpayers Against Fraud Education Fund by *Jennifer M. Verkamp* and *Chandra Napora*; for David Freeman Engstrom by *Mr. Engstrom*, *pro se*; and for Mark McGrath by *Sanford Rosenblum*.

Joel D. Hesch, *pro se*, filed a brief as *amicus curiae* supporting neither party.

We first hold that, at least in certain circumstances, the implied false certification theory can be a basis for liability. Specifically, liability can attach when the defendant submits a claim for payment that makes specific representations about the goods or services provided, but knowingly fails to disclose the defendant's noncompliance with a statutory, regulatory, or contractual requirement. In these circumstances, liability may attach if the omission renders those representations misleading.

We further hold that False Claims Act liability for failing to disclose violations of legal requirements does not turn upon whether those requirements were expressly designated as conditions of payment. Defendants can be liable for violating requirements even if they were not expressly designated as conditions of payment. Conversely, even when a requirement is expressly designated a condition of payment, not every violation of such a requirement gives rise to liability. What matters is not the label the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision.

A misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision in order to be actionable under the False Claims Act. We clarify below how that rigorous materiality requirement should be enforced.

Because the courts below interpreted § 3729(a)(1)(A) differently, we vacate the judgment and remand so that those courts may apply the approach set out in this opinion.

I

A

Enacted in 1863, the False Claims Act "was originally aimed principally at stopping the massive frauds perpetrated by large contractors during the Civil War." *United States* v. *Bornstein*, 423 U. S. 303, 309 (1976). "[A] series of sensational congressional investigations" prompted hearings where witnesses "painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war." *United States* v. *McNinch*, 356 U. S. 595, 599 (1958). Congress responded by imposing civil and criminal liability for 10 types of fraud on the Government, subjecting violators to double damages, forfeiture, and up to five years' imprisonment. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696.

Since then, Congress has repeatedly amended the Act, but its focus remains on those who present or directly induce the submission of false or fraudulent claims. See 31 U. S. C. § 3729(a) (imposing civil liability on "any person who . . . knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval"). A "claim" now includes direct requests to the Government for payment as well as reimbursement requests made to the recipients of federal funds under federal benefits programs. See § 3729(b)(2)(A). The Act's scienter requirement defines "knowing" and "knowingly" to mean that a person has "actual knowledge of the information," "acts in deliberate ignorance of the truth or falsity of the information," or "acts in reckless disregard of the truth or falsity of the information." § 3729(b)(1)(A). And the Act defines "material" to mean "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." § 3729(b)(4).

Congress also has increased the Act's civil penalties so that liability is "essentially punitive in nature." *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U. S. 765, 784 (2000). Defendants are subjected to treble damages plus civil penalties of up to $10,000 per false claim. § 3729(a); 28 CFR § 85.3(a)(9) (2015) (adjusting penalties for inflation).

B

The alleged False Claims Act violations here arose within the Medicaid program, a joint state-federal program in which healthcare providers serve poor or disabled patients and submit claims for government reimbursement. See generally 42 U. S. C. § 1396 *et seq.* The facts recited in the complaint, which we take as true at this stage, are as follows. For five years, Yarushka Rivera, a teenage beneficiary of Massachusetts' Medicaid program, received counseling services at Arbour Counseling Services, a satellite mental health facility in Lawrence, Massachusetts, owned and operated by a subsidiary of petitioner Universal Health Services. Beginning in 2004, when Yarushka started having behavioral problems, five medical professionals at Arbour intermittently treated her. In May 2009, Yarushka had an adverse reaction to a medication that a purported doctor at Arbour prescribed after diagnosing her with bipolar disorder. Her condition worsened; she suffered a seizure that required hospitalization. In October 2009, she suffered another seizure and died. She was 17 years old.

Thereafter, an Arbour counselor revealed to respondents Carmen Correa and Julio Escobar—Yarushka's mother and stepfather—that few Arbour employees were actually licensed to provide mental health counseling and that supervision of them was minimal. Respondents discovered that, of the five professionals who had treated Yarushka, only one was properly licensed. The practitioner who diagnosed Yarushka as bipolar identified herself as a psychologist with a Ph. D., but failed to mention that her degree came from an unaccredited Internet college and that Massachusetts had rejected her application to be licensed as a psychologist. Likewise, the practitioner who prescribed medicine to Yarushka, and who was held out as a psychiatrist, was in fact a nurse who lacked authority to prescribe medications absent supervision. Rather than ensuring supervision of unlicensed staff, the clinic's director helped to misrepresent the staff's qualifications. And the problem went beyond those who treated Yarushka. Some 23 Arbour employees lacked licenses to provide mental health services, yet—despite regulatory requirements to the contrary—they counseled patients and prescribed drugs without supervision.

When submitting reimbursement claims, Arbour used payment codes corresponding to different services that its staff provided to Yarushka, such as "Individual Therapy" and "family therapy." 1 App. 19, 20. Staff members also misrepresented their qualifications and licensing status to the Federal Government to obtain individual National Provider Identification numbers, which are submitted in connection with Medicaid reimbursement claims and correspond to specific job titles. For instance, one Arbour staff member who treated Yarushka registered for a number associated with " 'Social Worker, Clinical,' " despite lacking the credentials and licensing required for social workers engaged in mental health counseling. *Id.*, at 32.

After researching Arbour's operations, respondents filed complaints with various Massachusetts agencies. Massachusetts investigated and ultimately issued a report detailing Arbour's violation of over a dozen Massachusetts Medicaid regulations governing the qualifications and supervision required for staff at mental health facilities. Arbour agreed to a remedial plan, and two Arbour employees also entered into consent agreements with Massachusetts.

In 2011, respondents filed a *qui tam* suit in federal court, see 31 U. S. C. § 3730, alleging that Universal Health had violated the False Claims Act under an implied false certification theory of liability. The operative complaint asserts that Universal Health (acting through Arbour) submitted reimbursement claims that made representations about the specific services provided by specific types of professionals, but that failed to disclose serious violations of regulations pertaining to staff qualifications and licensing requirements for these services.[1] Specifically, the Massachusetts Medicaid program requires satellite facilities to have specific types of clinicians on staff, delineates licensing requirements for particular positions (like psychiatrists, social workers, and nurses), and details supervision requirements for other staff. See 130 Code Mass. Regs. §§ 429.422–424, 429.439 (2014). Universal Health allegedly flouted these regulations because Arbour employed unqualified, unlicensed, and unsupervised staff. The Massachusetts Medicaid program, unaware of these deficiencies, paid the claims. Universal Health thus allegedly defrauded the program, which would not have reimbursed the claims had it known that it was billed for mental health services that were performed by unlicensed and unsupervised staff. The United States declined to intervene.

The District Court granted Universal Health's motion to dismiss the complaint. Circuit precedent had previously embraced the implied false certification theory of liability. See, *e. g., United States ex rel. Hutcheson* v. *Blackstone Medical, Inc.*, 647 F. 3d 377, 385–387 (CA1 2011). But the District Court held that respondents had failed to state a claim under that theory because, with one exception not relevant here, none of the regulations that Arbour violated was a condition of payment. See 2014 WL 1271757, *1, *6–*12 (D Mass., Mar. 26, 2014).

The United States Court of Appeals for the First Circuit reversed in relevant part and remanded. 780 F. 3d 504, 517 (2015). The court observed that each time a billing party submits a claim, it "implicitly communicate[s] that it . . . conformed to the relevant program requirements, such that it was entitled to payment." *Id.*, at 514, n. 14. To determine

[1] Although Universal Health submitted some of the claims at issue before 2009, we assume—as the parties have done—that the 2009 amendments to the False Claims Act apply here. Universal Health does not argue, and we thus do not consider, whether pre-2009 conduct should be treated differently.

whether a claim is "false or fraudulent" based on such implicit communications, the court explained, it "asks simply whether the defendant, in submitting a claim for reimbursement, knowingly misrepresented compliance with a material precondition of payment." *Id.*, at 512. In the court's view, a statutory, regulatory, or contractual requirement can be a condition of payment either by expressly identifying itself as such or by implication. *Id.*, at 512–513. The court then held that Universal Health had violated Massachusetts Medicaid regulations that "clearly impose conditions of payment." *Id.*, at 513. The court further held that the regulations themselves "constitute[d] dispositive evidence of materiality," because they identified adequate supervision as an "express and absolute" condition of payment and "repeated[ly] reference[d]" supervision. *Id.*, at 514 (internal quotation marks omitted).

We granted certiorari to resolve the disagreement among the Courts of Appeals over the validity and scope of the implied false certification theory of liability. 577 U. S. 1025 (2015). The Seventh Circuit has rejected this theory, reasoning that only express (or affirmative) falsehoods can render a claim "false or fraudulent" under 31 U. S. C. § 3729(a)(1)(A). *United States* v. *Sanford-Brown, Ltd.*, 788 F. 3d 696, 711–712 (2015). Other courts have accepted the theory, but limit its application to cases where defendants fail to disclose violations of expressly designated conditions of payment. *E. g., Mikes* v. *Straus*, 274 F. 3d 687, 700 (CA2 2011). Yet others hold that conditions of payment need not be expressly designated as such to be a basis for False Claims Act liability. *E. g., United States* v. *Science Applications Int'l Corp.*, 626 F. 3d 1257, 1269 (CADC 2010) (*SAIC*).

II

We first hold that the implied false certification theory can, at least in some circumstances, provide a basis for liability. By punishing defendants who submit "false or fraudulent claims," the False Claims Act encompasses claims that make fraudulent misrepresentations, which include certain misleading omissions. When, as here, a defendant makes representations in submitting a claim but omits its violations of statutory, regulatory, or contractual requirements, those omissions can be a basis for liability if they render the defendant's representations misleading with respect to the goods or services provided.

To reach this conclusion, "[w]e start, as always, with the language of the statute." *Allison Engine Co.* v. *United States ex rel. Sanders*, 553 U. S. 662, 668 (2008) (brackets in original; internal quotation marks omitted). The False Claims Act imposes civil liability on "any person who . . . knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." § 3729(a)(1)(A). Congress did not define what makes a claim "false" or "fraudulent." But "[i]t is a settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses." *Sekhar* v. *United States*, 570 U. S. 729, 732 (2013) (internal quotation marks omitted). And the term "fraudulent" is a paradigmatic example of a statutory term that incorporates the common-law meaning of fraud. See *Neder* v. *United States*, 527 U. S. 1, 22 (1999) (the term "actionable 'fraud'" is one with "a well-settled meaning at common law").[2]

Because common-law fraud has long encompassed certain misrepresentations by omission, "false or fraudulent claims" include more than just claims containing express falsehoods. The parties and the Government agree that misrepresentations by omission can give rise to liability. Brief for Peti-

[2] The False Claims Act abrogates the common law in certain respects. For instance, the Act's scienter requirement "require[s] no proof of specific intent to defraud." 31 U. S. C. § 3729(b)(1)(B). But we presume that Congress retained all other elements of common-law fraud that are consistent with the statutory text because there are no textual indicia to the contrary. See *Neder*, 527 U. S., at 24–25.

tioner 30–31; Brief for Respondents 22–31; Brief for United States as *Amicus Curiae* 16–20.

The parties instead dispute whether submitting a claim without disclosing violations of statutory, regulatory, or contractual requirements constitutes such an actionable misrepresentation. Respondents and the Government invoke the common-law rule that, while nondisclosure alone ordinarily is not actionable, "[a] representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter" is actionable. Restatement (Second) of Torts § 529, p. 62 (1976). They contend that every submission of a claim for payment implicitly represents that the claimant is legally entitled to payment, and that failing to disclose violations of material legal requirements renders the claim misleading. Universal Health, on the other hand, argues that submitting a claim involves no representations, and that a different common-law rule thus governs: Nondisclosure of legal violations is not actionable absent a special " 'duty . . . to exercise reasonable care to disclose the matter in question,' " which it says is lacking in Government contracting. Brief for Petitioner 31 (quoting Restatement (Second) of Torts § 551(1), at 119).

We need not resolve whether all claims for payment implicitly represent that the billing party is legally entitled to payment. The claims in this case do more than merely demand payment. They fall squarely within the rule that half-truths—representations that state the truth only so far as it goes, while omitting critical qualifying information—can be actionable misrepresentations.[3] A classic example of an ac-

[3] This rule recurs throughout the common law. In tort law, for example, "if the defendant does speak, he must disclose enough to prevent his words from being misleading." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 106, p. 738 (5th ed. 1984). Contract law also embraces this principle. See, *e. g.,* Restatement (Second) of Contracts § 161, Comment *a,* p. 432 (1979). And we have used this definition

tionable half-truth in contract law is the seller who reveals that there may be two new roads near a property he is selling, but fails to disclose that a third potential road might bisect the property. See *Junius Constr. Co.* v. *Cohen*, 257 N. Y. 393, 400, 178 N. E. 672, 674 (1931) (Cardozo, J.). "The enumeration of two streets, described as unopened but projected, was a tacit representation that the land to be conveyed was subject to no others, and certainly subject to no others materially affecting the value of the purchase." *Ibid.* Likewise, an applicant for an adjunct position at a local college makes an actionable misrepresentation when his resume lists prior jobs and then retirement, but fails to disclose that his "retirement" was a prison stint for perpetrating a $12 million bank fraud. See 3 D. Dobbs, P. Hayden, & H. Bublick, Law of Torts § 682, pp. 702–703, and n. 14 (2d ed. 2011) (citing *Sarvis* v. *Vermont State Colleges*, 172 Vt. 76, 78, 80–82, 772 A. 2d 494, 496, 497–499 (2001)).

So too here, by submitting claims for payment using payment codes that corresponded to specific counseling services, Universal Health represented that it had provided individual therapy, family therapy, preventive medication counseling, and other types of treatment. Moreover, Arbour staff members allegedly made further representations in submitting Medicaid reimbursement claims by using National Provider Identification numbers corresponding to specific job titles. And these representations were clearly misleading in context. Anyone informed that a social worker at a Massachusetts mental health clinic provided a teenage patient with individual counseling services would probably—but wrongly—conclude that the clinic had complied with core Massachusetts Medicaid requirements (1) that a counselor "treating children [is] required to have specialized training and experience in children's services," 130 Code Mass. Regs. § 429.422, and also (2) that, at a minimum, the social worker

in other statutory contexts. See, *e. g., Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U. S. 27, 44 (2011) (securities law).

possesses the prescribed qualifications for the job, § 429.424(C). By using payment and other codes that conveyed this information without disclosing Arbour's many violations of basic staff and licensing requirements for mental health facilities, Universal Health's claims constituted misrepresentations.

Accordingly, we hold that the implied certification theory can be a basis for liability, at least where two conditions are satisfied: First, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.[4]

III

The second question presented is whether, as Universal Health urges, a defendant should face False Claims Act liability only if it fails to disclose the violation of a contractual, statutory, or regulatory provision that the Government expressly designated a condition of payment. We conclude that the Act does not impose this limit on liability. But we also conclude that not every undisclosed violation of an express condition of payment automatically triggers liability. Whether a provision is labeled a condition of payment is relevant to but not dispositive of the materiality inquiry.

A

Nothing in the text of the False Claims Act supports Universal Health's proposed restriction. Section 3729(a)(1)(A)

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[4] As an alternative argument, Universal Health asserts that misleading partial disclosures constitute fraudulent misrepresentations only when the initial statement partially disclosed unfavorable information. Not so. "[A] statement that contains only favorable matters and omits all reference to unfavorable matters is as much a false representation as if all the facts stated were untrue." Restatement (Second) of Torts § 529, Comment *a*, pp. 62–63 (1976).

imposes liability on those who present "false or fraudulent claims" but does not limit such claims to misrepresentations about express conditions of payment. See *SAIC*, 626 F. 3d, at 1268 (rejecting any textual basis for an express-designation rule). Nor does the common-law meaning of fraud tether liability to violating an express condition of payment. A statement that misleadingly omits critical facts is a misrepresentation irrespective of whether the other party has expressly signaled the importance of the qualifying information. *Supra,* at 188–190.

The False Claims Act's materiality requirement also does not support Universal Health. Under the Act, the misrepresentation must be material to the other party's course of action. But, as discussed below, see *infra,* at 194–196, statutory, regulatory, and contractual requirements are not automatically material, even if they are labeled conditions of payment. Cf. *Matrixx Initiatives, Inc.* v. *Siracusano,* 563 U. S. 27, 39 (2011) (materiality cannot rest on "a single fact or occurrence as always determinative" (internal quotation marks omitted)).

Nor does the Act's scienter requirement, § 3729(b)(1)(A), support Universal Health's position. A defendant can have "actual knowledge" that a condition is material without the Government expressly calling it a condition of payment. If the Government failed to specify that guns it orders must actually shoot, but the defendant knows that the Government routinely rescinds contracts if the guns do not shoot, the defendant has "actual knowledge." Likewise, because a reasonable person would realize the imperative of a functioning firearm, a defendant's failure to appreciate the materiality of that condition would amount to "deliberate ignorance" or "reckless disregard" of the "truth or falsity of the information" even if the Government did not spell this out.

Universal Health nonetheless contends that False Claims Act liability should be limited to undisclosed violations of expressly designated conditions of payment to provide defendants with fair notice and to cabin liability. But policy arguments cannot supersede the clear statutory text. *Kloeckner* v. *Solis*, 568 U. S. 41, 55–56, n. 4 (2012). In any event, Universal Health's approach risks undercutting these policy goals. The Government might respond by designating every legal requirement an express condition of payment. But billing parties are often subject to thousands of complex statutory and regulatory provisions. Facing False Claims Act liability for violating any of them would hardly help would-be defendants anticipate and prioritize compliance obligations. And forcing the Government to expressly designate a provision as a condition of *payment* would create further arbitrariness. Under Universal Health's view, misrepresenting compliance with a requirement that the Government expressly identified as a condition of payment could expose a defendant to liability. Yet, under this theory, misrepresenting compliance with a condition of eligibility to even participate in a federal program when submitting a claim would not.

Moreover, other parts of the False Claims Act allay Universal Health's concerns. "[I]nstead of adopting a circumscribed view of what it means for a claim to be false or fraudulent," concerns about fair notice and open-ended liability "can be effectively addressed through strict enforcement of the Act's materiality and scienter requirements." *SAIC*, *supra*, at 1270. Those requirements are rigorous.

B

As noted, a misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision in order to be actionable under the False Claims Act. We now clarify how that materiality requirement should be enforced.

Section 3729(b)(4) defines materiality using language that we have employed to define materiality in other federal fraud statutes: "[T]he term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." See *Neder*, 527 U. S., at 16 (using this definition to interpret the mail, bank, and wire fraud statutes); *Kungys* v. *United States*, 485 U. S. 759, 770 (1988) (same for fraudulent statements to immigration officials). This materiality requirement descends from "common-law antecedents." *Id.*, at 769. Indeed, "the common law could not have conceived of 'fraud' without proof of materiality." *Neder*, *supra*, at 22; see also Brief for United States as *Amicus Curiae* 30 (describing common-law principles and arguing that materiality under the False Claims Act should involve a "similar approach").

We need not decide whether § 3729(a)(1)(A)'s materiality requirement is governed by § 3729(b)(4) or derived directly from the common law. Under any understanding of the concept, materiality "look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." 26 R. Lord, Williston on Contracts § 69:12, p. 549 (4th ed. 2003) (Williston). In tort law, for instance, a "matter is material" in only two circumstances: (1) "[if] a reasonable man would attach importance to [it] in determining his choice of action in the transaction"; or (2) if the defendant knew or had reason to know that the recipient of the representation attaches importance to the specific matter "in determining his choice of action," even though a reasonable person would not. Restatement (Second) of Torts § 538, at 80. Materiality in contract law is substantially similar. See Restatement (Second) of Contracts § 162(2), and Comment *c*, pp. 439, 441 (1979) ("[A] misrepresentation is material" only if it would "likely . . . induce a reasonable person to manifest his assent," or the defendant "knows that for some special reason [the representation] is likely to induce the particular recipient to manifest his assent" to the transaction).[5]

[5] Accord, Williston § 69:12, at 549–550 ("most popular" understanding is "that a misrepresentation is material if it concerns a matter to which a reasonable person would attach importance in determining his or her

The materiality standard is demanding. The False Claims Act is not "an all-purpose antifraud statute," *Allison Engine*, 553 U. S., at 672, or a vehicle for punishing garden-variety breaches of contract or regulatory violations. A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment. Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance. Materiality, in addition, cannot be found where noncompliance is minor or insubstantial. See *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 543 (1943) (contractors' misrepresentation that they satisfied a noncollusive bidding requirement for federal program contracts violated the False Claims Act because "[t]he government's money would never have been placed in the joint fund for payment to respondents had its agents known the bids were collusive"); see also *Junius Constr.*, 257 N. Y., at 400, 178 N. E., at 674 (an undisclosed fact was material because "[n]o one can say with reason that the plaintiff would have signed this contract if informed of the likelihood" of the undisclosed fact).

In sum, when evaluating materiality under the False Claims Act, the Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive. Likewise, proof of materiality

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choice of action with respect to the transaction involved: which will induce action by a complaining party[,] knowledge of which would have induced the recipient to act differently" (footnote and bullets omitted)); *id.*, at 550 (noting rule that "a misrepresentation is material if, had it not been made, the party complaining of fraud would not have taken the action alleged to have been induced by the misrepresentation"); *Junius Constr. Co.* v. *Cohen*, 257 N. Y. 393, 400, 178 N. E. 672, 674 (1931) (a misrepresentation is material if it "went to the very essence of the bargain"); cf. *Neder* v. *United States*, 527 U. S. 1, 16, 22, n. 5 (1999) (relying on " 'natural tendency to influence' " standard and citing Restatement (Second) of Torts § 538 definition of materiality).

can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement. Conversely, if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.[6]

These rules lead us to disagree with the Government's and First Circuit's view of materiality: that any statutory, regulatory, or contractual violation is material so long as the defendant knows that the Government would be entitled to refuse payment were it aware of the violation. See Brief for United States as *Amicus Curiae* 30; Tr. of Oral Arg. 43 (Government's "test" for materiality "is whether the person knew that the government could lawfully withhold payment"); 780 F. 3d, at 514; see also Tr. of Oral Arg. 26, 29 (statements by respondents' counsel endorsing this view). At oral argument, the United States explained the implications of its position: If the Government contracts for health services and adds a requirement that contractors buy American-made staplers, anyone who submits a claim for those services but fails to disclose its use of foreign staplers violates the False Claims Act. To the Government, liability would attach if the defendant's use of foreign staplers would entitle the Gov-

[6] We reject Universal Health's assertion that materiality is too fact intensive for courts to dismiss False Claims Act cases on a motion to dismiss or at summary judgment. The standard for materiality that we have outlined is a familiar and rigorous one. And False Claims Act plaintiffs must also plead their claims with plausibility and particularity under Federal Rules of Civil Procedure 8 and 9(b) by, for instance, pleading facts to support allegations of materiality.

ernment not to pay the claim in whole or part—irrespective of whether the Government routinely pays claims despite knowing that foreign staplers were used. *Id.*, at 39–45. Likewise, if the Government required contractors to aver their compliance with the entire U. S. Code and Code of Federal Regulations, then under this view, failing to mention noncompliance with any of those requirements would always be material. The False Claims Act does not adopt such an extraordinarily expansive view of liability.

* * *

Because both opinions below assessed respondents' complaint based on interpretations of § 3729(a)(1)(A) that differ from ours, we vacate the First Circuit's judgment and remand the case for reconsideration of whether respondents have sufficiently pleaded a False Claims Act violation. See *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Industry Pension Fund*, 575 U. S. 175, 195 (2015). We emphasize, however, that the False Claims Act is not a means of imposing treble damages and other penalties for insignificant regulatory or contractual violations. This case centers on allegations of fraud, not medical malpractice. Respondents have alleged that Universal Health misrepresented its compliance with mental health facility requirements that are so central to the provision of mental health counseling that the Medicaid program would not have paid these claims had it known of these violations. Respondents may well have adequately pleaded a violation of § 3729(a)(1)(A). But we leave it to the courts below to resolve this in the first instance.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

KIRTSAENG, DBA BLUECHRISTINE99 *v.* JOHN WILEY & SONS, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 15–375. Argued April 25, 2016—Decided June 16, 2016

In *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U. S. 519, this Court held that petitioner Supap Kirtsaeng could invoke the Copyright Act's "first-sale doctrine," see 17 U. S. C. § 109(a), as a defense to the copyright infringement claim filed by textbook publisher John Wiley & Sons, Inc. Having won his case, Kirtsaeng returned to the District Court to seek more than $2 million in attorney's fees from Wiley under the Copyright Act's fee-shifting provision. See § 505. The District Court denied Kirtsaeng's application because, it reasoned, imposing a fee award against a losing party that had taken reasonable positions during litigation (as Wiley had done) would not serve the Act's purposes. Affirming, the Second Circuit held that the District Court was correct to place "substantial weight" on the reasonableness of Wiley's position and that the District Court did not abuse its discretion in determining that the other factors did not outweigh the reasonableness finding.

Held:

1. When deciding whether to award attorney's fees under § 505, a district court should give substantial weight to the objective reasonableness of the losing party's position, while still taking into account all other circumstances relevant to granting fees. Pp. 202–209.

(a) Section 505 states that a district court "may . . . award a reasonable attorney's fee to the prevailing party." Although the text "clearly connotes discretion" and eschews any "precise rule or formula," *Fogerty* v. *Fantasy, Inc.*, 510 U. S. 517, 533, 534, the Court has placed two restrictions on that authority: First, a court may not "award[ ] attorney's fees as a matter of course," *id.*, at 533; and second, a court may not treat prevailing plaintiffs and prevailing defendants differently, *id.*, at 527. The Court also noted "several nonexclusive factors" for courts to consider, *e. g.*, "frivolousness, motivation, objective unreasonableness[,] and the need in particular circumstances to advance considerations of compensation and deterrence," *id.*, at 534, n. 19, and left open the possibility of providing further guidance in the future, *id.*, at 534–535.

This Court agrees with both Kirtsaeng and Wiley that additional guidance respecting the application of § 505 is proper so as to further channel district court discretion towards the purposes of the Copyright

Act. In addressing other open-ended fee-shifting statutes, this Court has emphasized that "in a system of laws discretion is rarely without limits," and it has "found" those limits by looking to "the large objectives of the relevant Act." *Flight Attendants* v. *Zipes*, 491 U. S. 754, 758, 759. In accord with such precedents, this Court must determine what approach to fee awards under § 505 best advances the well-settled objectives of the Copyright Act, which are to "enrich[ ] the general public through access to creative works" by striking a balance between encouraging and rewarding authors' creations and enabling others to build on that work. *Fogerty*, 510 U. S., at 527, 526. Fee awards should thus encourage the types of lawsuits that advance those aims. Pp. 202–205.

(b) Wiley's approach—to put substantial weight on the reasonableness of a losing party's position—passes this test because it enhances the probability that creators and users (*i. e.*, plaintiffs and defendants) will enjoy the substantive rights the Act provides. Parties with strong positions are encouraged to stand on their rights, given the likelihood that they will recover fees from the losing (*i. e.*, unreasonable) party; those with weak ones are deterred by the likelihood of having to pay two sets of fees. By contrast, Kirtsaeng's proposal—to give special consideration to whether a suit meaningfully clarified copyright law by resolving an important and close legal issue—would produce no sure benefits. Even accepting that litigation of close cases advances the public interest, fee-shifting will not necessarily, or even usually, encourage parties to litigate those cases to judgment. While fees increase the reward for a victory, they also enhance the penalty for a defeat—and the parties in hard cases cannot be confident if they will win or lose.

Wiley's approach is also more administrable. A district court that has ruled on the merits of a copyright case can easily assess whether the losing party advanced an unreasonable position. By contrast, a judge may not know whether a newly decided issue will have broad legal significance. Pp. 205–208.

(c) Still, objective reasonableness can be only a substantial factor in assessing fee applications—not the controlling one. In deciding whether to fee-shift, district courts must take into account a range of considerations beyond the reasonableness of litigating positions. Pp. 208–209.

2. While the Second Circuit properly calls for district courts to give "substantial weight" to the reasonableness of a losing party's litigating positions, its language at times suggests that a finding of reasonableness raises a presumption against granting fees, and that goes too far in cabining the district court's analysis. Because the District Court thus may not have understood the full scope of its discretion, it should have

the opportunity to reconsider Kirtsaeng's fee application. On remand, the District Court should continue to give substantial weight to the reasonableness of Wiley's position but also take into account all other relevant factors. Pp. 209–210.

605 Fed. Appx. 48, vacated and remanded.

Kagan, J., delivered the opinion for a unanimous Court.

E. Joshua Rosenkranz argued the cause for petitioner. With him on the briefs were *Annette L. Hurst*, *Lisa T. Simpson*, *Thomas M. Bondy*, *Andrew D. Silverman*, and *Sam P. Israel*.

Paul M. Smith argued the cause for respondent. With him on the brief were *Matthew S. Hellman* and *Ishan K. Bhabha*.

Elaine J. Goldenberg argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Solicitor General Verrilli*, *Principal Deputy Assistant Attorney General Mizer*, *Deputy Solicitor General Stewart*, and *Mark R. Freeman*.*

Justice Kagan delivered the opinion of the Court.

Section 505 of the Copyright Act provides that a district court "may . . . award a reasonable attorney's fee to the prevailing party." 17 U. S. C. § 505. The question presented here is whether a court, in exercising that authority, should give substantial weight to the objective reasonableness of the losing party's position. The answer, as both decisions

**Charles Duan* and *Seth D. Greenstein* filed a brief for Public Knowledge as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Copyright Alliance by *Eleanor M. Lackman* and *Nancy E. Wolff*; for Rimini Street, Inc., by *Mark A. Perry* and *Blaine H. Evanson*; and for Volunteer Lawyers for the Arts, Inc., by *David Leichtman* and *Sherli Furst*.

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *Barbara A. Fiacco*, *Jenevieve J. Maerker*, and *Denise W. DeFranco*; and for the Intellectual Property Owners Association by *Gunnar B. Gundersen*, *Kevin H. Rhodes*, and *Steven W. Miller*.

below held, is yes—the court should. But the court must also give due consideration to all other circumstances relevant to granting fees; and it retains discretion, in light of those factors, to make an award even when the losing party advanced a reasonable claim or defense. Because we are not certain that the lower courts here understood the full scope of that discretion, we return the case for further consideration of the prevailing party's fee application.

I

Petitioner Supap Kirtsaeng, a citizen of Thailand, came to the United States 20 years ago to study math at Cornell University. He quickly figured out that respondent John Wiley & Sons, an academic publishing company, sold virtually identical English-language textbooks in the two countries—but for far less in Thailand than in the United States. Seeing a ripe opportunity for arbitrage, Kirtsaeng asked family and friends to buy the foreign editions in Thai bookstores and ship them to him in New York. He then resold the textbooks to American students, reimbursed his Thai suppliers, and pocketed a tidy profit.

Wiley sued Kirtsaeng for copyright infringement, claiming that his activities violated its exclusive right to distribute the textbooks. See 17 U. S. C. §§ 106(3), 602(a)(1). Kirtsaeng invoked the "first-sale doctrine" as a defense. That doctrine typically enables the lawful owner of a book (or other work) to resell or otherwise dispose of it as he wishes. See § 109(a). But Wiley contended that the first-sale doctrine did not apply when a book (like those Kirtsaeng sold) was manufactured abroad.

At the time, courts were in conflict on that issue. Some thought, as Kirtsaeng did, that the first-sale doctrine permitted the resale of foreign-made books; others maintained, along with Wiley, that it did not. And this Court, in its first pass at the issue, divided 4 to 4. See *Costco Wholesale Corp.* v. *Omega, S. A.*, 562 U. S. 40 (2010) (*per curiam*). In this case, the District Court sided with Wiley; so too did a divided panel of the Court of Appeals for the Second Circuit. See 654 F. 3d 210, 214, 222 (2011). To settle the continuing conflict, this Court granted Kirtsaeng's petition for certiorari and reversed the Second Circuit in a 6-to-3 decision, thus establishing that the first-sale doctrine allows the resale of foreign-made books, just as it does domestic ones. See *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U. S. 519, 525 (2013).

Returning victorious to the District Court, Kirtsaeng invoked § 505 to seek more than $2 million in attorney's fees from Wiley. The court denied his motion. Relying on Second Circuit precedent, the court gave "substantial weight" to the "objective reasonableness" of Wiley's infringement claim. See No. 08–cv–07834 (SDNY, Dec. 20, 2013), App. to Pet. for Cert. 18a, 2013 WL 6722887, *4. In explanation of that approach, the court stated that "the imposition of a fee award against a copyright holder with an objectively reasonable"—although unsuccessful—"litigation position will generally not promote the purposes of the Copyright Act." *Id.*, at 11a (quoting *Matthew Bender & Co.* v. *West Publishing Co.*, 240 F. 3d 116, 122 (CA2 2001); emphasis deleted). Here, Wiley's position was reasonable: After all, several Courts of Appeals and three Justices of the Supreme Court had agreed with it. See App. to Pet. for Cert. 12a. And according to the District Court, no other circumstance "overr[o]de" that objective reasonableness, so as to warrant fee-shifting. *Id.*, at 22a. The Court of Appeals affirmed, concluding in a brief summary order that "the district court properly placed 'substantial weight' on the reasonableness of [Wiley's] position" and committed no abuse of discretion in deciding that other "factors did not outweigh" the reasonableness finding. 605 Fed. Appx. 48, 49, 50 (CA2 2015).

We granted certiorari, 577 U. S. 1098 (2016), to resolve disagreement in the lower courts about how to address an application for attorney's fees in a copyright case.[1]

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[1] Compare, *e. g.*, *Matthew Bender & Co.* v. *West Publishing Co.*, 240 F. 3d 116, 122 (CA2 2001) (giving substantial weight to objective reasonableness), with, *e. g.*, *Bond* v. *Blum*, 317 F. 3d 385, 397–398 (CA4 2003) (endors-

II

Section 505 states that a district court "may . . . award a reasonable attorney's fee to the prevailing party." It thus authorizes fee-shifting, but without specifying standards that courts should adopt, or guideposts they should use, in determining when such awards are appropriate.

In *Fogerty* v. *Fantasy, Inc.*, 510 U. S. 517 (1994), this Court recognized the broad leeway § 505 gives to district courts—but also established several principles and criteria to guide their decisions. See *id.*, at 519 (asking "what standards should inform" the exercise of the trial court's authority). The statutory language, we stated, "clearly connotes discretion," and eschews any "precise rule or formula" for awarding fees. *Id.*, at 533, 534. Still, we established a pair of restrictions. First, a district court may not "award[ ] attorney's fees as a matter of course"; rather, a court must make a more particularized, case-by-case assessment. *Id.*, at 533. Second, a court may not treat prevailing plaintiffs and prevailing defendants any differently; defendants should be "encouraged to litigate [meritorious copyright defenses] to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement." *Id.*, at 527. In addition, we noted with approval "several nonexclusive factors" to inform a court's fee-shifting decisions: "frivolousness, motivation, objective unreasonableness[,] and the need in particular circumstances to advance considerations of compensation and deterrence." *Id.*, at 534, n. 19. And we left open the possibility of providing further guidance in the future, in response to (and grounded on) lower courts' evolving experience. See *id.*, at 534–535; *Martin* v. *Franklin Capital Corp.*, 546 U. S. 132, 140, n. (2005) (noting that *Fogerty* was not intended to be the end of the matter).

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ing a totality-of-the-circumstances approach, without according special significance to any factor), and with, *e. g., Hogan Systems, Inc.* v. *Cybersource Int'l, Inc.*, 158 F. 3d 319, 325 (CA5 1998) (presuming that a prevailing party receives fees).

The parties here, though sharing some common ground, now dispute what else we should say to district courts. Both Kirtsaeng and Wiley agree—as they must—that § 505 grants courts wide latitude to award attorney's fees based on the totality of circumstances in a case. See Brief for Petitioner 17; Brief for Respondent 35. Yet both reject the position, taken by some Courts of Appeals, see *supra,* at 201, n. 1, that *Fogerty* spelled out the only appropriate limits on judicial discretion—in other words, that each district court should otherwise proceed as it sees fit, assigning whatever weight to whatever factors it chooses. Rather, Kirtsaeng and Wiley both call, in almost identical language, for "[c]hanneling district court discretion towards the purposes of the Copyright Act." Brief for Petitioner 16; see Brief for Respondent 21 ("[A]n appellate court [should] channel a district court's discretion so that it . . . further[s] the goals of the Copyright Act"). (And indeed, as discussed later, both describe those purposes identically. See *infra,* at 204.) But at that point, the two part ways. Wiley argues that giving substantial weight to the reasonableness of a losing party's position will best serve the Act's objectives. See Brief for Respondent 24–35. By contrast, Kirtsaeng favors giving special consideration to whether a lawsuit resolved an important and close legal issue and thus "meaningfully clarifie[d]" copyright law. Brief for Petitioner 36; see *id.,* at 41–44.

We join both parties in seeing a need for some additional guidance respecting the application of § 505. In addressing other open-ended fee-shifting statutes, this Court has emphasized that "in a system of laws discretion is rarely without limits." *Flight Attendants* v. *Zipes*, 491 U. S. 754, 758 (1989); see *Halo Electronics, Inc.* v. *Pulse Electronics, Inc.*, 579 U. S. 93 (2016). Without governing standards or principles, such provisions threaten to condone judicial "whim" or predilection. *Martin,* 546 U. S., at 139; see also *ibid.* ("[A] motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles" (quoting *United States* v. *Burr*, 25 F. Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C. J.))). At the least, utterly freewheeling inquiries often deprive litigants of "the basic principle of justice that like cases should be decided alike," *Martin*, 546 U. S., at 139—as when, for example, one judge thinks the parties' "motivation[s]" determinative and another believes the need for "compensation" trumps all else, *Fogerty*, 510 U. S., at 534, n. 19. And so too, such unconstrained discretion prevents individuals from predicting how fee decisions will turn out, and thus from making properly informed judgments about whether to litigate. For those reasons, when applying fee-shifting laws with "no explicit limit or condition," *Halo*, 579 U. S., at 103, we have nonetheless "found limits" in them—and we have done so, just as both parties urge, by looking to "the large objectives of the relevant Act," *Zipes*, 491 U. S., at 759 (internal quotation marks omitted); see *supra*, at 203.

In accord with such precedents, we must consider if either Wiley's or Kirtsaeng's proposal well advances the Copyright Act's goals. Those objectives are well settled. As *Fogerty* explained, "copyright law ultimately serves the purpose of enriching the general public through access to creative works." 510 U. S., at 527; see U. S. Const., Art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts"). The statute achieves that end by striking a balance between two subsidiary aims: encouraging and rewarding authors' creations while also enabling others to build on that work. See *Fogerty*, 510 U. S., at 526. Accordingly, fee awards under § 505 should encourage the types of lawsuits that promote those purposes. (That is why, for example, *Fogerty* insisted on treating prevailing plaintiffs and prevailing defendants alike—because the one could "further the policies of the Copyright Act every bit as much as" the other. 510 U. S., at 527.) On that much, both parties agree. Brief for Petitioner 37; Brief for Respondent 29–30. The contested issue is whether giving substantial weight to the objective (un)reasonableness of a losing party's litigating position—or, alternatively, to a lawsuit's role in settling significant and uncertain legal issues—will predictably encourage such useful copyright litigation.

The objective-reasonableness approach that Wiley favors passes that test because it both encourages parties with strong legal positions to stand on their rights and deters those with weak ones from proceeding with litigation. When a litigant—whether plaintiff or defendant—is clearly correct, the likelihood that he will recover fees from the opposing (*i. e.*, unreasonable) party gives him an incentive to litigate the case all the way to the end. The holder of a copyright that has obviously been infringed has good reason to bring and maintain a suit even if the damages at stake are small; and likewise, a person defending against a patently meritless copyright claim has every incentive to keep fighting, no matter that attorney's fees in a protracted suit might be as or more costly than a settlement. Conversely, when a person (again, whether plaintiff or defendant) has an unreasonable litigating position, the likelihood that he will have to pay two sets of fees discourages legal action. The copyright holder with no reasonable infringement claim has good reason not to bring suit in the first instance (knowing he cannot force a settlement and will have to proceed to judgment); and the infringer with no reasonable defense has every reason to give in quickly, before each side's litigation costs mount. All of those results promote the Copyright Act's purposes, by enhancing the probability that both creators and users (*i. e.*, potential plaintiffs and defendants) will enjoy the substantive rights the statute provides.

By contrast, Kirtsaeng's proposal would not produce any sure benefits. We accept his premise that litigation of close cases can help ensure that "the boundaries of copyright law [are] demarcated as clearly as possible," thus advancing the public interest in creative work. Brief for Petitioner 19 (quoting *Fogerty*, 510 U. S., at 527). But we cannot agree that fee-shifting will necessarily, or even usually, encourage parties to litigate those cases to judgment. Fee awards are a double-edged sword: They increase the reward for a victory—but also enhance the penalty for a defeat. And the hallmark of hard cases is that no party can be confident if he will win or lose. That means Kirtsaeng's approach could just as easily discourage as encourage parties to pursue the kinds of suits that "meaningfully clarif[y]" copyright law. Brief for Petitioner 36. It would (by definition) raise the stakes of such suits; but whether those higher stakes would provide an incentive—or instead a disincentive—to litigate hinges on a party's attitude toward risk. Is the person risk-preferring or risk-averse—a high-roller or a penny-ante type? Only the former would litigate more in Kirtsaeng's world. See Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. Legal Studies 399, 428 (1973) (fees "make[ ] the expected value of litigation less for risk-averse litigants, which will encourage [them to] settle[ ]"). And Kirtsaeng offers no reason to think that serious gamblers predominate. See, *e. g., Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 636, n. 8 (1981) ("Economists disagree over whether business decision-makers[ ] are 'risk averse' "); *CIGNA Corp.* v. *Amara*, 563 U. S. 421, 430 (2011) ("[M]ost individuals are risk averse"). So the value of his standard, unlike Wiley's, is entirely speculative.[2]

[2] This case serves as a good illustration. Imagine you are Kirtsaeng at a key moment in his case—say, when deciding whether to petition this Court for certiorari. And suppose (as Kirtsaeng now wishes) that the prevailing party in a hard and important case—like this one—will probably get a fee award. Does that make you more likely to file, because you will recoup your own fees if you win? Or less likely to file, because you will foot Wiley's bills if you lose? Here are some answers to choose from (recalling that you cannot confidently predict which way the Court will rule): (A) Six of one, half a dozen of the other. (B) Depends if I'm feeling lucky that day. (C) Less likely—this is getting scary; who knows how

What is more, Wiley's approach is more administrable than Kirtsaeng's. A district court that has ruled on the merits of a copyright case can easily assess whether the losing party advanced an unreasonable claim or defense. That is closely related to what the court has already done: In deciding any case, a judge cannot help but consider the strength and weakness of each side's arguments. By contrast, a judge may not know at the conclusion of a suit whether a newly decided issue will have, as Kirtsaeng thinks critical, broad legal significance. The precedent-setting, law-clarifying value of a decision may become apparent only in retrospect—sometimes, not until many years later. And so too a decision's practical impact (to the extent Kirtsaeng would have courts separately consider that factor). District courts are not accustomed to evaluating in real time either the jurisprudential or the on-the-ground import of their rulings. Exactly how they would do so is uncertain (Kirtsaeng points to no other context in which courts undertake such an analysis), but we fear that the inquiry would implicate our oft-stated concern that an application for attorney's fees "should not result in a second major litigation." *Zipes*, 491 U. S., at 766 (quoting *Hensley* v. *Eckerhart*, 461 U. S. 424, 437 (1983)). And we suspect that even at the end of that post-lawsuit lawsuit, the results would typically reflect little more than educated guesses.

Contrary to Kirtsaeng's view, placing substantial weight on objective reasonableness also treats plaintiffs and defendants even-handedly, as *Fogerty* commands. No matter which side wins a case, the court must assess whether the other side's position was (un)reasonable. And of course, both plaintiffs and defendants can (and sometimes do) make unreasonable arguments. Kirtsaeng claims that the reason-

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much money Wiley will spend on Supreme Court lawyers? (D) More likely—the higher the stakes, the greater the rush. Only if lots of people answer (D) will Kirtsaeng's standard work in the way advertised. Maybe. But then again, maybe not.

ableness inquiry systematically favors plaintiffs because a losing defendant "will virtually *always* be found to have done something culpable." Brief for Petitioner 29 (emphasis in original). But that conflates two different questions: whether a defendant in fact infringed a copyright and whether he made serious arguments in defense of his conduct. Courts every day see reasonable defenses that ultimately fail (just as they see reasonable claims that come to nothing); in this context, as in any other, they are capable of distinguishing between those defenses (or claims) and the objectively unreasonable variety. And if some court confuses the issue of liability with that of reasonableness, its fee award should be reversed for abuse of discretion.[3]

All of that said, objective reasonableness can be only an important factor in assessing fee applications—not the controlling one. As we recognized in *Fogerty,* § 505 confers broad discretion on district courts and, in deciding whether to fee-shift, they must take into account a range of considerations beyond the reasonableness of litigating positions. See *supra,* at 202. That means in any given case a court may award fees even though the losing party offered reasonable

[3] Kirtsaeng also offers statistics meant to show that in practice, even if not in theory, the objective-reasonableness inquiry unduly favors plaintiffs; but the Solicitor General as *amicus curiae* has cast significant doubt on that claim. According to Kirtsaeng, 86% of winning copyright holders, but only 45% of prevailing defendants, have received fee awards over the last 15 years in the Second Circuit (which, recall, gives substantial weight to objective reasonableness). See Reply Brief 17–18; *supra,* at 201. But first, the Solicitor General represents that the overall numbers are actually 77% and 53%, respectively. See Tr. of Oral Arg. 41. And second, the Solicitor General points out that all these percentages include default judgments, which almost invariably give rise to fee awards—but usually of a very small amount—because the defendant has not shown up to oppose either the suit or the fee application. When those cases are taken out, the statistics look fairly similar: 60% for plaintiffs versus 53% for defendants. See *id.,* at 42. And of course, there may be good reasons why copyright plaintiffs and defendants do not make reasonable arguments in perfectly equal proportion.

arguments (or, conversely, deny fees even though the losing party made unreasonable ones). For example, a court may order fee-shifting because of a party's litigation misconduct, whatever the reasonableness of his claims or defenses. See, *e. g.*, *Viva Video, Inc.* v. *Cabrera*, 9 Fed. Appx. 77, 80 (CA2 2001). Or a court may do so to deter repeated instances of copyright infringement or overaggressive assertions of copyright claims, again even if the losing position was reasonable in a particular case. See, *e. g.*, *Bridgeport Music, Inc.* v. *WB Music Corp.*, 520 F. 3d 588, 593–595 (CA6 2008) (awarding fees against a copyright holder who filed hundreds of suits on an overbroad legal theory, including in a subset of cases in which it was objectively reasonable). Although objective reasonableness carries significant weight, courts must view all the circumstances of a case on their own terms, in light of the Copyright Act's essential goals.

And on that score, Kirtsaeng has raised serious questions about how fee-shifting actually operates in the Second Circuit. To be sure, the Court of Appeals' framing of the inquiry resembles our own: It calls for a district court to give "substantial weight" to the reasonableness of a losing party's litigating positions while also considering other relevant circumstances. See 605 Fed. Appx., at 49–50; *Matthew Bender*, 240 F. 3d, at 122. But the Court of Appeals' language at times suggests that a finding of reasonableness raises a presumption against granting fees, see *ibid.*; *supra*, at 201—and that goes too far in cabining how a district court must structure its analysis and what it may conclude from its review of relevant factors. Still more, district courts in the Second Circuit appear to have overly learned the Court of Appeals' lesson, turning "substantial" into more nearly "dispositive" weight. As Kirtsaeng notes, hardly any decisions in that Circuit have granted fees when the losing party raised a reasonable argument (and none have denied fees when the losing party failed to do so). See Reply Brief 15. For these reasons, we vacate the decision below so that the

District Court can take another look at Kirtsaeng's fee application. In sending back the case for this purpose, we do not at all intimate that the District Court should reach a different conclusion. Rather, we merely ensure that the court will evaluate the motion consistent with the analysis we have set out—giving substantial weight to the reasonableness of Wiley's litigating position, but also taking into account all other relevant factors.

* * *

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

ENCINO MOTORCARS, LLC *v.* NAVARRO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15–415. Argued April 20, 2016—Decided June 20, 2016

The Fair Labor Standards Act (FLSA) requires employers to pay overtime compensation to covered employees who work more than 40 hours in a given week. In 1966, Congress enacted an exemption from the overtime compensation requirement for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles" at a covered dealership. Fair Labor Standards Amendments of 1966, § 209, 80 Stat. 836, codified as amended at 29 U. S. C. § 213(b)(10)(A). Congress authorized the Department of Labor to promulgate necessary rules, regulations, or orders with respect to this new provision. The Department exercised that authority in 1970 and issued a regulation that defined "salesman" to mean "an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the vehicles . . . which the establishment is primarily engaged in selling." 29 CFR § 779.372(c)(1) (1971). The regulation excluded service advisors, who sell repair and maintenance services but not vehicles, from the exemption. Several courts, however, rejected the Department's conclusion that service advisors are not covered by the statutory exemption. In 1978, the Department issued an opinion letter departing from its previous position and stating that service advisors could be exempt under 29 U. S. C. § 213(b)(10)(A). In 1987, the Department confirmed its new interpretation by amending its Field Operations Handbook to clarify that service advisors should be treated as exempt under the statute. In 2011, however, the Department issued a final rule that followed the original 1970 regulation and interpreted the statutory term "salesman" to mean only an employee who sells vehicles. 76 Fed. Reg. 18859. The Department gave little explanation for its decision to abandon its decades-old practice of treating service advisors as exempt under § 213(b)(10)(A).

Petitioner is an automobile dealership. Respondents are or were employed by petitioner as service advisors. Respondents filed suit alleging that petitioner violated the FLSA by failing to pay them overtime compensation when they worked more than 40 hours in a week. Petitioner moved to dismiss, arguing that the FLSA overtime provisions do not apply to respondents because service advisors are covered by the § 213(b)(10)(A) exemption. The District Court granted the motion, but the Ninth Circuit reversed in relevant part. Deferring under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, to the interpretation set forth in the 2011 regulation, the court held that service advisors are not covered by the § 213(b)(10)(A) exemption.

Held: Section 213(b)(10)(A) must be construed without placing controlling weight on the Department's 2011 regulation. Pp. 219–224.

(a) When an agency is authorized by Congress to issue regulations and promulgates a regulation interpreting a statute it enforces, the interpretation receives deference if the statute is ambiguous and the agency's interpretation is reasonable. See *Chevron, supra*, at 842–844. When Congress authorizes an agency to proceed through notice-and-comment rulemaking, that procedure is a "very good indicator" that Congress intended the regulation to carry the force of law, so *Chevron* should apply. *United States* v. *Mead Corp.*, 533 U. S. 218, 229–230. But *Chevron* deference is not warranted where the regulation is "procedurally defective"—that is, where the agency errs by failing to follow the correct procedures in issuing the regulation. 533 U. S., at 227.

One basic procedural requirement of administrative rulemaking is that an agency must give adequate reasons for its decisions. Where the agency has failed to provide even a minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law. Agencies are free to change their existing policies, but in explaining its changed position, an agency must be cognizant that longstanding policies may have "engendered serious reliance interests that must be taken into account." *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502, 515. An "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice," *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U. S. 967, 981, and an arbitrary and capricious regulation of this sort receives no *Chevron* deference. Pp. 219–222.

(b) Applying those principles, the 2011 regulation was issued without the reasoned explanation that was required in light of the Department's change in position and the significant reliance interests involved. The industry had relied since 1978 on the Department's position that service advisors are exempt from the FLSA's overtime pay requirements, and had negotiated and structured compensation plans against this background understanding. In light of this background, the Department needed a more reasoned explanation for its decision to depart from its existing enforcement policy. The Department instead said almost nothing. It did not analyze or explain why the statute should be interpreted to exempt dealership employees who sell vehicles but not dealership employees who sell services. This lack of reasoned explication for a regulation that is inconsistent with the Department's longstanding earlier position results in a rule that cannot carry the force of law, and so the regulation does not receive *Chevron* deference. It is appropriate to remand for the Ninth Circuit to interpret § 213(b)(10)(A) in the first instance. Pp. 222–224.

780 F. 3d 1267, vacated and remanded.

Kennedy, J., delivered the opinion of the Court, in which Roberts, C. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Ginsburg, J., filed a concurring opinion, in which Sotomayor, J., joined, *post*, p. 225. Thomas, J., filed a dissenting opinion, in which Alito, J., joined, *post*, p. 227.

Paul D. Clement argued the cause for petitioner. With him on the briefs were *Jeffrey M. Harris*, *Karl R. Lindegren*, *Todd B. Scherwin*, *Colin P. Calvert*, and *Wendy McGuire Coats*.

Stephanos Bibas argued the cause for respondents. With him on the brief were *James A. Feldman* and *Nancy Bregstein Gordon*.

Anthony A. Yang argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Verrilli*, *Deputy Solicitor General Kneedler*, and *M. Patricia Smith*.*

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America et al. by *Matthew W. Lampe*, *E. Michael Rossman*, *Kate Comerford Todd*, *Warren D. Postman*, *Deborah White*, and *Ryan J. Watson*; and for the National Automobile Dealers Association et al. by *Felicia R. Reid* and *Douglas I. Greenhaus*.

Briefs of *amici curiae* urging affirmance were filed for the International Association of Machinists and Aerospace Workers, AFL–CIO, by *David A. Rosenfeld* and *Mark D. Schneider*; for Law Professors by *David C. Frederick*, *Michael F. Sturley*, *Lynn E. Blais*, and *Erin Glenn Busby*; and for the National Employment Lawyers Association et al. by *Terisa E. Chaw* and *Catherine K. Ruckelshaus*.

JUSTICE KENNEDY delivered the opinion of the Court.

This case addresses whether a federal statute requires payment of increased compensation to certain automobile dealership employees for overtime work. The federal statute in question is the Fair Labor Standards Act (FLSA), 29 U. S. C. § 201 *et seq.*, enacted in 1938 to "protect all covered workers from substandard wages and oppressive working hours." *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U. S. 728, 739 (1981). Among its other provisions, the FLSA requires employers to pay overtime compensation to covered employees who work more than 40 hours in a given week. The rate of overtime pay must be "not less than one and one-half times the regular rate" of the employee's pay. § 207(a).

Five current and former service advisors brought this suit alleging that the automobile dealership where they were employed was required by the FLSA to pay them overtime wages. The dealership contends that the position and duties of a service advisor bring these employees within § 213(b)(10)(A), which establishes an exemption from the FLSA overtime provisions for certain employees engaged in selling or servicing automobiles. The case turns on the interpretation of this exemption.

I

A

Automobile dealerships in many communities not only sell vehicles but also sell repair and maintenance services. Among the employees involved in providing repair and maintenance services are service advisors, partsmen, and mechanics. Service advisors interact with customers and sell them services for their vehicles. A service advisor's duties may include meeting customers; listening to their concerns about their cars; suggesting repair and maintenance services; selling new accessories or replacement parts; recording service orders; following up with customers as the services are performed (for instance, if new problems are discovered); and explaining the repair and maintenance work when customers return for their vehicles. See App. 40–41; see also *Brennan* v. *Deel Motors, Inc.*, 475 F. 2d 1095, 1096 (CA5 1973); 29 CFR § 779.372(c)(4) (1971). Partsmen obtain the vehicle parts needed to perform repair and maintenance and provide those parts to the mechanics. See § 779.372(c)(2). Mechanics perform the actual repair and maintenance work. See § 779.372(c)(3).

In 1961, Congress enacted a blanket exemption from the FLSA's minimum wage and overtime provisions for all automobile dealership employees. Fair Labor Standards Amendments of 1961, § 9, 75 Stat. 73. In 1966, Congress repealed that broad exemption and replaced it with a narrower one. The revised statute did not exempt dealership employees from the minimum wage requirement. It also limited the exemption from the overtime compensation requirement to cover only certain employees—in particular, "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft" at a covered dealership. Fair Labor Standards Amendments of 1966, § 209, 80 Stat. 836. Congress authorized the Department of Labor to "promulgate necessary rules, regulations, or orders" with respect to this new provision. § 602, *id.*, at 844.

The Department exercised that authority in 1970 and issued a regulation that defined the statutory terms "salesman," "partsman," and "mechanic." 35 Fed. Reg. 5896 (codified at 29 CFR § 779.372(c)). The Department intended its regulation as a mere interpretive rule explaining its own views, rather than a legislative rule with the force and effect of law; and so the Department did not issue the regulation through the notice-and-comment procedures of the Administrative Procedure Act. See 35 Fed. Reg. 5856; see also 5 U. S. C. § 553(b)(A) (exempting interpretive rules from notice and comment).

The 1970 interpretive regulation defined "salesman" to mean "an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the vehicles or farm implements which the establishment is primarily engaged in selling." 29 CFR § 779.372(c)(1). By limiting the statutory term to salesmen who sell vehicles or farm implements, the regulation excluded service advisors from the exemption, since a service advisor sells repair and maintenance services but not the vehicle itself. The regulation made that exclusion explicit in a later subsection: "Employees variously described as service manager, service writer, service advisor, or service salesman . . . are not exempt under [the statute]. This is true despite the fact that such an employee's principal function may be disagnosing [*sic*] the mechanical condition of vehicles brought in for repair, writing up work orders for repairs authorized by the customer, assigning the work to various employees and directing and checking on the work of mechanics." § 779.372(c)(4).

Three years later, the Court of Appeals for the Fifth Circuit rejected the Department's conclusion that service advisors are not covered by the statutory exemption. *Deel Motors*, *supra*. Certain District Courts followed that precedent. See *Yenney* v. *Cass County Motors*, 81 CCH LC ¶33,506 (Neb. 1977); *Brennan* v. *North Bros. Ford, Inc.*, 76 CCH LC ¶33,247 (ED Mich. 1975), aff'd *sub nom. Dunlop* v. *North Bros. Ford, Inc.*, 529 F. 2d 524 (CA6 1976) (table); *Brennan* v. *Import Volkswagen, Inc.*, 81 CCH LC ¶33,522 (Kan. 1975).

In the meantime, Congress amended the statutory provision by enacting its present text, which now sets out the exemption in two subsections. Fair Labor Standards Amendments of 1974, § 14, 88 Stat. 65. The first subsection is at issue in this case. It exempts "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements" at a covered dealership. 29 U. S. C. § 213(b)(10)(A). The second subsection exempts "any salesman primarily engaged in selling trailers, boats, or aircraft" at a covered dealership. § 213(b)(10)(B). The statute thus exempts certain employees engaged in servicing automobiles, trucks, or farm implements, but not similar employees engaged in servicing trailers, boats, or aircraft.

In 1978, the Department issued an opinion letter departing from its previous position. Taking a position consistent with the cases decided by the courts, the opinion letter stated that service advisors could be exempt under § 213(b)(10)(A). Dept. of Labor, Wage & Hour Div., Opinion Letter No. 1520 (WH–467) (1978), [1978–1981 Transfer Binder] CCH Wages–Hours Administrative Rulings ¶31,207. The letter acknowledged that the Department's new policy "represent[ed] a change from the position set forth in section 779.372(c)(4)" of its 1970 regulation. In 1987, the Department confirmed its 1978 interpretation by amending its Field Operations Handbook to clarify that service advisors should be treated as exempt under § 213(b)(10)(A). It observed that some courts had interpreted the statutory exemption to cover service advisors; and it stated that, as a result of those decisions, it would "no longer deny the [overtime] exemption for such employees." Dept. of Labor, Wage & Hour Div., Field Operations Handbook, Insert No. 1757, 24L04–4(k) (Oct. 20, 1987). The Department again acknowledged that its new position represented a change from its 1970 regulation and stated that the regulation would "be revised as soon as is practicable." *Ibid.*

Twenty-one years later, in 2008, the Department at last issued a notice of proposed rulemaking. 73 Fed. Reg. 43654. The notice observed that every court that had considered the question had held service advisors to be exempt under § 213(b)(10)(A), and that the Department itself had treated service advisors as exempt since 1987. *Id.*, at 43658–43659. The Department proposed to revise its regulations to accord with existing practice by interpreting the exemption in §213(b)(10)(A) to cover service advisors.

In 2011, however, the Department changed course yet again. It announced that it was "not proceeding with the proposed rule." 76 Fed. Reg. 18833. Instead, the Department completed its 2008 notice-and-comment rulemaking by issuing a final rule that took the opposite position from the proposed rule. The new final rule followed the original 1970 regulation and interpreted the statutory term "salesman" to mean only an employee who sells automobiles, trucks, or farm implements. *Id.*, at 18859 (codified at 29 CFR §779.372(c)(1)).

The Department gave little explanation for its decision to abandon its decades-old practice of treating service advisors as exempt under §213(b)(10)(A). It was also less than precise when it issued its final rule. As described above, the 1970 regulation included a separate subsection stating in express terms that service advisors "are not exempt" under the relevant provision. 29 CFR §779.372(c)(4). In promulgating the 2011 regulation, however, the Department eliminated that separate subsection. According to the United States, this change appears to have been "an inadvertent mistake in drafting." Tr. of Oral Arg. 50.

B

Petitioner is a Mercedes-Benz automobile dealership in the Los Angeles area. Respondents are or were employed by petitioner as service advisors. They assert that petitioner required them to be at work from 7 a.m. to 6 p.m. at least five days per week, and to be available for work matters during breaks and while on vacation. App. 39–40. Respondents were not paid a fixed salary or an hourly wage for their work; instead, they were paid commissions on the services they sold. *Id.*, at 40–41.

Respondents sued petitioner in the United States District Court for the Central District of California, alleging that petitioner violated the FLSA by failing to pay them overtime compensation when they worked more than 40 hours in a week. *Id.*, at 42–44. Petitioner moved to dismiss, arguing that the FLSA overtime provisions do not apply to respondents because service advisors are covered by the statutory exemption in § 213(b)(10)(A). The District Court agreed and granted the motion to dismiss.

The Court of Appeals for the Ninth Circuit reversed in relevant part. It construed the statute by deferring under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), to the interpretation set forth by the Department in its 2011 regulation. Applying that deference, the Court of Appeals held that service advisors are not covered by the § 213(b)(10)(A) exemption. 780 F. 3d 1267 (2015). The Court of Appeals recognized, however, that its decision conflicted with cases from a number of other courts. *Id.*, at 1274 (citing, *inter alia*, *Walton* v. *Greenbrier Ford, Inc.*, 370 F. 3d 446 (CA4 2004); *Deel Motors*, 475 F. 2d 1095; *Thompson* v. *J. C. Billion, Inc.*, 368 Mont. 299, 294 P. 3d 397 (2013)). This Court granted certiorari to resolve the question. 577 U. S. 1098 (2016).

II

A

The full text of the statutory subsection at issue states that the overtime provisions of the FLSA shall not apply to:

> "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." § 213(b)(10)(A).

The question presented is whether this exemption should be interpreted to include service advisors. To resolve that question, it is necessary to determine what deference, if any, the courts must give to the Department's 2011 interpretation.

In the usual course, when an agency is authorized by Congress to issue regulations and promulgates a regulation interpreting a statute it enforces, the interpretation receives deference if the statute is ambiguous and if the agency's interpretation is reasonable. This principle is implemented by the two-step analysis set forth in *Chevron*. At the first step, a court must determine whether Congress has "directly spoken to the precise question at issue." 467 U. S., at 842. If so, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.*, at 842–843. If not, then at the second step the court must defer to the agency's interpretation if it is "reasonable." *Id.*, at 844.

A premise of *Chevron* is that when Congress grants an agency the authority to administer a statute by issuing regulations with the force of law, it presumes the agency will use that authority to resolve ambiguities in the statutory scheme. See *id.*, at 843–844; *United States* v. *Mead Corp.*, 533 U. S. 218, 229–230 (2001). When Congress authorizes an agency to proceed through notice-and-comment rulemaking, that "relatively formal administrative procedure" is a "very good indicator" that Congress intended the regulation to carry the force of law, so *Chevron* should apply. *Mead Corp.*, *supra*, at 229–230. But *Chevron* deference is not warranted where the regulation is "procedurally defective"—that is, where the agency errs by failing to follow the correct procedures in issuing the regulation. 533 U. S., at 227; cf. *Long Island Care at Home, Ltd.* v. *Coke*, 551 U. S. 158, 174–176 (2007) (rejecting challenge to procedures by which regulation was issued and affording *Chevron* deference). Of course, a party might be foreclosed in some instances from challenging the procedures used to promulgate a given rule. Cf., *e. g., JEM Broadcasting Co.* v. *FCC*, 22 F. 3d 320, 324–326 (CADC 1994); cf. also *Auer* v. *Robbins*, 519 U. S. 452, 458–459 (1997) (party cannot challenge agency's failure to amend its rule in light of changed circumstances without first seeking relief from the agency). But where a proper challenge is raised to the agency procedures, and those procedures are defective, a court should not accord *Chevron* deference to the agency interpretation. Respondents do not contest the manner in which petitioner has challenged the agency procedures here, and so this opinion assumes without deciding that the challenge was proper.

One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions. The agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983) (internal quotation marks omitted). That requirement is satisfied when the agency's explanation is clear enough that its "path may reasonably be discerned." *Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U. S. 281, 286 (1974). But where the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law. See 5 U. S. C. § 706(2)(A); *State Farm*, *supra*, at 42–43.

Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change. See, *e. g., National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U. S. 967, 981–982 (2005); *Chevron*, 467 U. S., at 863–864. When an agency changes its existing position, it "need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate." *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502, 515 (2009). But the agency must at least "display awareness that it is changing position" and "show that there are good reasons for the new policy." *Ibid.* (emphasis deleted). In explaining its changed position, an agency must also be cognizant that longstanding policies may have "engendered serious reliance interests that must be taken into account." *Ibid.*; see also *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 742 (1996). "In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox Television Stations*, *supra*, at 515–516. It follows that an "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Brand X*, *supra*, at 981. An arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference. See *Mead Corp.*, *supra*, at 227.

B

Applying those principles here, the unavoidable conclusion is that the 2011 regulation was issued without the reasoned explanation that was required in light of the Department's change in position and the significant reliance interests involved. In promulgating the 2011 regulation, the Department offered barely any explanation. A summary discussion may suffice in other circumstances, but here—in particular because of decades of industry reliance on the Department's prior policy—the explanation fell short of the agency's duty to explain why it deemed it necessary to overrule its previous position.

The retail automobile and truck dealership industry had relied since 1978 on the Department's position that service advisors are exempt from the FLSA's overtime pay requirements. See National Automobile Dealers Association, Comment Letter on Proposed Rule Updating Regulations Issued Under the Fair Labor Standards Act (Sept. 26, 2008), online at https://www.regulations.gov/#!documentDetail;D=WHD-2008-0003-0038 (as last visited June 16, 2016). Dealerships and service advisors negotiated and structured their compensation plans against this background understanding. Requiring dealerships to adapt to the Department's new position could necessitate systemic, significant changes to the dealerships' compensation arrangements. See Brief for National Automobile Dealers Association et al. as *Amici Curiae* 13–14. Dealerships whose service advisors are not compensated in accordance with the Department's new views could also face substantial FLSA liability, see 29 U. S. C. § 216(b), even if this risk of liability may be diminished in some cases by the existence of a separate FLSA exemption for certain employees paid on a commission basis, see § 207(i), and even if a dealership could defend against retroactive liability by showing it relied in good faith on the prior agency position, see § 259(a). In light of this background, the Department needed a more reasoned explanation for its decision to depart from its existing enforcement policy.

The Department said that, in reaching its decision, it had "carefully considered all of the comments, analyses, and arguments made for and against the proposed changes." 76 Fed. Reg. 18832. And it noted that, since 1978, it had treated service advisors as exempt in certain circumstances. *Id.*, at 18838. It also noted the comment from the National Automobile Dealers Association stating that the industry had relied on that interpretation. *Ibid.*

But when it came to explaining the "good reasons for the new policy," *Fox Television Stations*, *supra*, at 515, the Department said almost nothing. It stated only that it would not treat service advisors as exempt because "the statute does not include such positions and the Department recognizes that there are circumstances under which the requirements for the exemption would not be met." 76 Fed. Reg. 18838. It continued that it "believes that this interpretation is reasonable" and "sets forth the appropriate approach." *Ibid.* Although an agency may justify its policy choice by explaining why that policy "is more consistent with statutory language" than alternative policies, *Long Island Care at*

Home, 551 U. S., at 175 (internal quotation marks omitted), the Department did not analyze or explain why the statute should be interpreted to exempt dealership employees who sell vehicles but not dealership employees who sell services (that is, service advisors). And though several public comments supported the Department's reading of the statute, the Department did not explain what (if anything) it found persuasive in those comments beyond the few statements above.

It is not the role of the courts to speculate on reasons that might have supported an agency's decision. "[W]e may not supply a reasoned basis for the agency's action that the agency itself has not given." *State Farm*, 463 U. S., at 43 (citing *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196 (1947)). Whatever potential reasons the Department might have given, the agency in fact gave almost no reasons at all. In light of the serious reliance interests at stake, the Department's conclusory statements do not suffice to explain its decision. See *Fox Television Stations*, *supra*, at 515–516. This lack of reasoned explication for a regulation that is inconsistent with the Department's longstanding earlier position results in a rule that cannot carry the force of law. See 5 U. S. C. § 706(2)(A); *State Farm*, *supra*, at 42–43. It follows that this regulation does not receive *Chevron* deference in the interpretation of the relevant statute.

* * *

For the reasons above, § 213(b)(10)(A) must be construed without placing controlling weight on the Department's 2011 regulation. Because the decision below relied on *Chevron* deference to this regulation, it is appropriate to remand for the Court of Appeals to interpret the statute in the first instance. Cf. *Mead*, 533 U. S., at 238–239. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, concurring.

I agree in full that, in issuing its 2011 rule, the Department of Labor did not satisfy its basic obligation to explain "that there are good reasons for [a] new policy." *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502, 515 (2009). The Department may have adequate reasons to construe the Fair Labor Standards Act automobile-dealership exemption as it did. The 2011 rulemaking tells us precious little, however, about what those reasons are.[1]

I write separately to stress that nothing in today's opinion disturbs well-established law. In particular, where an agency has departed from a prior position, there is no "heightened standard" of arbitrary-and-capricious review. *Id.*, at 514. See also *ante*, at 221. An agency must "display awareness that it is changing position" and "show that there are good reasons for the new policy." *Fox*, 556 U. S., at 515 (emphasis deleted). "But it need not demonstrate to a court's satisfaction that the reasons for the new policy are

[1] Unlike JUSTICE THOMAS, I am not persuaded that, sans *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), the Ninth Circuit should conclude on remand that service advisors are categorically exempt from hours regulations. As that court previously explained, "[s]ervice advisors may be 'salesmen' in a generic sense, but they [may fall outside the exemption because they] do not personally sell cars and they do not personally service cars." 780 F. 3d 1267, 1274 (2015). Moreover, in its briefing before this Court, the Department of Labor responded to the argument that "the exemption's application to a 'partsman'" "confirm[s] that a service advisor is a salesman primarily engaged in servicing automobiles." *Post*, at 229 (THOMAS, J., dissenting). See Brief for United States as *Amicus Curiae* 22–23 (maintaining that partsmen, unlike service advisors, actually engage in maintenance and repair work); Brief for Respondents 11 (contending that partsmen "ge[t] their hands dirty" by "work[ing] as a mechanic's right-hand man or woman"); *id.*, at 32–35 (cataloging descriptions of partsmen responsibilities drawn from occupational handbooks and training manuals). The Court appropriately leaves the proper ranking of service advisors to the Court of Appeals in the first instance.

better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Ibid.*

The Court's bottom line remains unaltered: " '[U]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.' " *Ante*, at 222 (quoting *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U. S. 967, 981 (2005)). Industry reliance may spotlight the inadequacy of an agency's explanation. See *ante*, at 222 ("decades of industry reliance" make "summary discussion" inappropriate). But reliance does not overwhelm good reasons for a policy change. Even if the Department's changed position would "necessitate systemic, significant changes to the dealerships' compensation arrangements," *ante*, at 223, the Department would not be disarmed from determining that the benefits of overtime coverage outweigh those costs.[2] "If the action rests upon . . . an

[2] If the Department decides to reissue the 2011 rule, I doubt that reliance interests would pose an insurmountable obstacle. As the Court acknowledges, *ante,* at 223, an affirmative defense in the Fair Labor Standards Act (FLSA) protects regulated parties against retroactive liability for actions taken in good-faith reliance on superseded agency guidance, 29 U. S. C. § 259(a). And a separate FLSA exemption covers many service advisors: retail or service workers who receive at least half of their pay on commission, so long as their regular rate of pay is more than 1½ times the minimum wage. *Ante,* at 223 (citing § 207(i)); see Brief for Petitioner 13, n. 4 (many service advisors are paid on a commission basis). Thus, the cost of the Department's policy shift may be considerably less than the dealerships project. Finally, I note, the extent to which the Department is obliged to address reliance will be affected by the thoroughness of public comments it receives on the issue. In response to its 2008 proposal, the Department received only conclusory references to industry reliance interests. See *ante,* at 222 (citing comment from National Automobile Dealers Association). An agency cannot be faulted for failing to discuss at length matters only cursorily raised before it.

exercise of judgment in an area which Congress has entrusted to the agency[,] of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so." *SEC* v. *Chenery Corp.*, 318 U. S. 80, 94 (1943).

JUSTICE THOMAS, with whom JUSTICE ALITO joins, dissenting.

The Court granted this case to decide whether an exemption under the Fair Labor Standards Act (FLSA), 29 U. S. C. § 201 *et seq.*, "requires payment of increased compensation to certain automobile dealership employees"— known as service advisors—"for overtime work." *Ante*, at 214; see also *ante*, at 215, 219. The majority declines to resolve that question. Instead, after explaining why the Court owes no deference to the Department of Labor's regulation purporting to interpret this provision, see *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984), the majority leaves it "for the Court of Appeals to interpret the statute in the first instance." *Ante*, at 224.

I agree with the majority's conclusion that we owe no *Chevron* deference to the Department's position because "deference is not warranted where [a] regulation is 'procedurally defective.'" *Ante*, at 220. But I disagree with its ultimate decision to punt on the issue before it. We have an "obligation . . . to decide the merits of the question presented." *CBOCS West, Inc.* v. *Humphries*, 553 U. S. 442, 472 (2008) (THOMAS, J., dissenting). We need not wade into the murky waters of *Chevron* deference to decide whether the Ninth Circuit's reading of the statute was correct. We must instead examine the statutory text. That text reveals that service advisors are salesmen primarily engaged in the selling of services for automobiles. Accordingly, I would reverse the Ninth Circuit's judgment.

Federal law requires overtime pay for certain employees who work more than 40 hours per week. § 207(a)(2)(C).

But the FLSA exempts various categories of employees from this overtime requirement. § 213. The question before the Court is whether the following exemption encompasses service advisors:

> "The provisions of section 207 of this title shall not apply with respect to—
>
> . . . . .
>
> "(10)(A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." § 213(b).

I start with the uncontroversial notion that a service advisor is a "salesman." The FLSA does not define the term "salesman," so "we give the term its ordinary meaning." *Taniguchi* v. *Kan Pacific Saipan, Ltd.*, 566 U. S. 560, 566 (2012). A "salesman" is someone who sells goods or services. 14 Oxford English Dictionary 391 (2d ed. 1989) ("[a] man whose business it is to sell goods or conduct sales"); Random House Dictionary of the English Language 1262 (1966) (Random House) ("a man who sells goods, services, etc."). Service advisors, whose role it is to "interact with customers and sell them services for their vehicles," *ante,* at 214–215, are plainly "salesm[e]n." See *ante,* at 216 (cataloging sales-related duties of service advisors).

A service advisor, however, is not "primarily engaged in selling . . . automobiles." § 213(b)(10)(A). On the contrary, a service advisor is a "salesman" who sells servicing solutions. *Ante,* at 214. So the exemption applies only if it covers *not only* those salesmen primarily engaged in selling automobiles *but also* those salesmen primarily engaged in servicing automobiles.

The exemption's structure confirms that salesmen could do both. The exemption contains three nouns ("salesman, partsman, or mechanic") and two gerunds ("selling or servicing"). The three nouns are connected by the disjunctive "or," as are the gerunds. So unless context dictates otherwise, a salesman can *either* be engaged in selling *or* servicing automobiles. Cf. *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 339 (1979).

Context does not dictate otherwise. A salesman, namely, one who sells servicing solutions, can be "primarily engaged in . . . servicing automobiles." § 213(b)(10)(A). The FLSA does not define the term "servicing," but its ordinary meaning includes both "[t]he action of maintaining or repairing a motor vehicle" and "the action of providing a service." 15 Oxford English Dictionary 39; see also Random House 1304 (defining "service" to mean "the providing . . . of . . . activities required by the public, as maintenance, repair, etc."). A service advisor's selling of service solutions fits both definitions. The service advisor is the customer's liaison for purposes of deciding what parts are necessary to maintain or repair a vehicle and therefore is primarily engaged in "the action of maintaining or repairing a motor vehicle" or "the action of providing a service" for an automobile.

Other features of the exemption confirm that a service advisor is a salesman primarily engaged in servicing automobiles. Consider the exemption's application to a "partsman." Like a service advisor, a partsman neither sells vehicles nor repairs vehicles himself. See 29 CFR § 779.372(c)(2) (2015) (defining "partsman" as "any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts"). For the provision to exempt partsmen, then, the phrase "primarily engaged in . . . servicing" must cover some employees who do not themselves perform repair or maintenance. So "servicing" refers not only to the physical act of repairing or maintaining a vehicle but also to acts integral to the servicing process more generally.

Respondents' contrary contentions are unavailing. They first invoke the distributive canon: "Where a sentence contains several antecedents and several consequents," the distributive canon instructs courts to "read [those several terms] distributively and apply the words to the subjects which, by context, they seem most properly to relate." 2A N. Singer & S. Singer, Sutherland on Statutory Construction § 47.26, p. 448 (rev. 7th ed. 2014). Respondents accordingly maintain that 29 U. S. C. § 213(b)(10)(A) exempts *only* salesmen primarily engaged in selling automobiles. Brief for Respondents 20–26. But the distributive canon is less helpful in cases such as this because the antecedents and consequents cannot be readily matched on a one-to-one basis. Here, there are three nouns to be matched with only two gerunds, so the canon does not overcome the exemption's plain meaning. Perhaps respondents might have a better argument if the statute exempted "salesman or mechanics who primarily engage in selling or servicing automobiles." In such a case, one might assume that Congress meant the nouns and gerunds to match on a one-to-one basis, and the distributive canon could be utilized to determine how the matching should occur. But that is not the statute before us. For the reasons explained, *supra,* at 228–229, the plain meaning of the various terms in the exemption establish that the term "salesman" is not limited to only those who sell automobiles. It also extends to those "primarily engaged in . . . servicing automobiles." § 213(b)(10)(A).

Respondents also resist this natural reading of the exemption by invoking the made-up canon that courts must narrowly construe the FLSA exemptions. Brief for Respondents 41–42. The Ninth Circuit agreed with respondents on this score. 780 F. 3d 1267, 1271–1272, and n. 3 (2015). The court should not do so again on remand. We have declined to apply that canon on two recent occasions, one of which also required the Court to parse the meaning of an exemption in § 213. *Christopher* v. *SmithKline Beecham Corp.*, 567 U. S. 142, 164, n. 21 (2012); see also *Sandifer* v. *United States Steel Corp.*, 571 U. S. 220, 232, n. 7 (2014). There is no basis to infer that Congress means anything beyond what a statute plainly says simply because the legislation in question could be classified as "remedial." See Scalia, Assorted Canards of Contemporary Legal Analysis, 40 Case W. Res. L. Rev. 581, 581–586 (1990). Indeed, this canon appears to "res[t] on an elemental misunderstanding of the legislative process," viz., "that Congress intend[s] statutes to extend as far as possible in service of a singular objective." Brief for Chamber of Commerce of the United States of America et al. as *Amici Curiae* 7.

* * *

For the foregoing reasons, I would hold that the FLSA exemption set out in § 213(b)(10)(A) covers the service advisors in this case. Service advisors are "primarily engaged in . . . servicing automobiles," given their integral role in selling and providing vehicle services. Accordingly, I would reverse the judgment of the Ninth Circuit.

UTAH *v.* STRIEFF

CERTIORARI TO THE SUPREME COURT OF UTAH

No. 14–1373. Argued February 22, 2016—Decided June 20, 2016

Narcotics detective Douglas Fackrell conducted surveillance on a South Salt Lake City residence based on an anonymous tip about drug activity. The number of people he observed making brief visits to the house over the course of a week made him suspicious that the occupants were dealing drugs. After observing respondent Edward Strieff leave the residence, Officer Fackrell detained Strieff at a nearby parking lot, identifying himself and asking Strieff what he was doing at the house. He then requested Strieff's identification and relayed the information to a police dispatcher, who informed him that Strieff had an outstanding arrest warrant for a traffic violation. Officer Fackrell arrested Strieff, searched him, and found methamphetamine and drug paraphernalia. Strieff moved to suppress the evidence, arguing that it was derived from an unlawful investigatory stop. The trial court denied the motion, and the Utah Court of Appeals affirmed. The Utah Supreme Court reversed, however, and ordered the evidence suppressed.

Held: The evidence Officer Fackrell seized incident to Strieff's arrest is admissible based on an application of the attenuation factors from *Brown* v. *Illinois*, 422 U. S. 590. In this case, there was no flagrant police misconduct. Therefore, Officer Fackrell's discovery of a valid, pre-existing, and untainted arrest warrant attenuated the connection between the unconstitutional investigatory stop and the evidence seized incident to a lawful arrest. Pp. 237–243.

(a) As the primary judicial remedy for deterring Fourth Amendment violations, the exclusionary rule encompasses both the "primary evidence obtained as a direct result of an illegal search or seizure" and, relevant here, "evidence later discovered and found to be derivative of an illegality." *Segura* v. *United States*, 468 U. S. 796, 804. But to ensure that those deterrence benefits are not outweighed by the rule's substantial social costs, there are several exceptions to the rule. One exception is the attenuation doctrine, which provides for admissibility when the connection between unconstitutional police conduct and the evidence is sufficiently remote or has been interrupted by some intervening circumstance. See *Hudson* v. *Michigan*, 547 U. S. 586, 593. Pp. 237–238.

(b) As a threshold matter, the attenuation doctrine is not limited to the defendant's independent acts. The doctrine therefore applies here, where the intervening circumstance is the discovery of a valid, preexisting, and untainted arrest warrant. Assuming, without deciding, that Officer Fackrell lacked reasonable suspicion to stop Strieff initially, the discovery of that arrest warrant attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to his arrest. Pp. 238–243.

(1) Three factors articulated in *Brown* v. *Illinois*, 422 U. S. 590, lead to this conclusion. The first, "temporal proximity" between the initially unlawful stop and the search, *id.*, at 603, favors suppressing the evidence. Officer Fackrell discovered drug contraband on Strieff only minutes after the illegal stop. In contrast, the second factor, "the presence of intervening circumstances," *id.*, at 603–604, strongly favors the State. The existence of a valid warrant, predating the investigation and entirely unconnected with the stop, favors finding sufficient attenuation between the unlawful conduct and the discovery of evidence. That warrant authorized Officer Fackrell to arrest Strieff, and once the arrest was authorized, his search of Strieff incident to that arrest was undisputedly lawful. The third factor, "the purpose and flagrancy of the official misconduct," *id.*, at 604, also strongly favors the State. Officer Fackrell was at most negligent, but his errors in judgment hardly rise to a purposeful or flagrant violation of Strieff's Fourth Amendment rights. After the unlawful stop, his conduct was lawful, and there is no indication that the stop was part of any systemic or recurrent police misconduct. Pp. 239–242.

(2) Strieff's counterarguments are unpersuasive. First, neither Officer Fackrell's purpose nor the flagrancy of the violation rises to a level of misconduct warranting suppression. Officer Fackrell's purpose was not to conduct a suspicionless fishing expedition but was to gather information about activity inside a house whose occupants were legitimately suspected of dealing drugs. Strieff conflates the standard for an illegal stop with the standard for flagrancy, which requires more than the mere absence of proper cause. Second, it is unlikely that the prevalence of outstanding warrants will lead to dragnet searches by police. Such misconduct would expose police to civil liability and, in any event, is already accounted for by *Brown*'s "purpose and flagrancy" factor. Pp. 242–243.

2015 UT 2, 357 P. 3d 532, reversed.

Thomas, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Breyer, and Alito, JJ., joined. Sotomayor, J., filed a dissenting opinion, in which Ginsburg, J., joined as to Parts I, II, and III, *post*, p. 243. Kagan, J., filed a dissenting opinion, in which Ginsburg, J., joined, *post*, p. 255.

Tyler R. Green, Solicitor General of Utah, argued the cause for petitioner. With him on the briefs were *Sean D. Reyes*, Attorney General, *Laura B. Dupaix*, Deputy Solicitor General, *Thomas B. Brunker*, and *Jeffrey S. Gray*.

John F. Bash argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Verrilli, Assistant Attorney General Caldwell, Deputy Solicitor General Dreeben*, and *David M. Lieberman*.

Joan C. Watt argued the cause for respondent. With her on the brief were *Stuart Banner* and *Patrick L. Anderson*.*

Justice Thomas delivered the opinion of the Court.

To enforce the Fourth Amendment's prohibition against "unreasonable searches and seizures," this Court has at times required courts to exclude evidence obtained by uncon-

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*Briefs of *amici curiae* urging reversal were filed for the State of Michigan et al. by *Bill Schuette*, Attorney General of Michigan, *Aaron D. Lindstrom*, Solicitor General, and *Kathryn M. Dalzell*, Assistant Solicitor General, and by the Attorneys General and other officials for their respective States as follows: *Luther Strange* of Alabama, *Mark Brnovich* of Arizona, *Leslie Rutledge* of Arkansas, *Cynthia Coffman* of Colorado, *Pamela Jo Bondi* of Florida, *Douglas S. Chin* of Hawaii, *Lisa Madigan* of Illinois, *Gregory F. Zoeller* of Indiana, *Derek Schmidt* of Kansas, *Jack Conway* of Kentucky, *James D. "Buddy" Caldwell* of Louisiana, *Janet T. Mills* of Maine, *Douglas F. Gansler* of Maryland, *Timothy C. Fox* of Montana, *Douglas J. Peterson* of Nebraska, *John J. Hoffman*, Acting Attorney General of New Jersey, *Adam Paul Laxalt* of Nevada, *Wayne Stenehjem* of North Dakota, *Michael DeWine* of Ohio, *Ellen F. Rosenblum* of Oregon, *E. Scott Pruitt* of Oklahoma, *Bruce R. Beemer*, First Deputy Attorney General of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Herbert Slatery III* of Tennessee, *Ken Paxton* of Texas, *Patrick Morrisey* of West Virginia, and *Peter K. Michael* of Wyoming; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Michael B. Kimberly, Steven R. Shapiro*, and *Jeffrey L. Fisher*; for the Electronic Privacy Information Center et al. by *Marc Rotenberg* and *Alan Butler*; and for Tracy E. Labrusciano et al. by *Norman M. Garland* and *Michael M. Epstein*.

stitutional police conduct. But the Court has also held that, even when there is a Fourth Amendment violation, this exclusionary rule does not apply when the costs of exclusion outweigh its deterrent benefits. In some cases, for example, the link between the unconstitutional conduct and the discovery of the evidence is too attenuated to justify suppression. The question in this case is whether this attenuation doctrine applies when an officer makes an unconstitutional investigatory stop; learns during that stop that the suspect is subject to a valid arrest warrant; and proceeds to arrest the suspect and seize incriminating evidence during a search incident to that arrest. We hold that the evidence the officer seized as part of the search incident to arrest is admissible because the officer's discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest.

I

This case began with an anonymous tip. In December 2006, someone called the South Salt Lake City police's drug-tip line to report "narcotics activity" at a particular residence. App. 15. Narcotics detective Douglas Fackrell investigated the tip. Over the course of about a week, Officer Fackrell conducted intermittent surveillance of the home. He observed visitors who left a few minutes after arriving at the house. These visits were sufficiently frequent to raise his suspicion that the occupants were dealing drugs.

One of those visitors was respondent Edward Strieff. Officer Fackrell observed Strieff exit the house and walk toward a nearby convenience store. In the store's parking lot, Officer Fackrell detained Strieff, identified himself, and asked Strieff what he was doing at the residence.

As part of the stop, Officer Fackrell requested Strieff's identification, and Strieff produced his Utah identification card. Officer Fackrell relayed Strieff's information to a police dispatcher, who reported that Strieff had an outstanding arrest warrant for a traffic violation. Officer Fackrell then arrested Strieff pursuant to that warrant. When Officer

Fackrell searched Strieff incident to the arrest, he discovered a baggie of methamphetamine and drug paraphernalia.

The State charged Strieff with unlawful possession of methamphetamine and drug paraphernalia. Strieff moved to suppress the evidence, arguing that the evidence was inadmissible because it was derived from an unlawful investigatory stop. At the suppression hearing, the prosecutor conceded that Officer Fackrell lacked reasonable suspicion for the stop but argued that the evidence should not be suppressed because the existence of a valid arrest warrant attenuated the connection between the unlawful stop and the discovery of the contraband.

The trial court agreed with the State and admitted the evidence. The court found that the short time between the illegal stop and the search weighed in favor of suppressing the evidence, but that two countervailing considerations made it admissible. First, the court considered the presence of a valid arrest warrant to be an " 'extraordinary intervening circumstance.' " App. to Pet. for Cert. 102 (quoting *United States* v. *Simpson*, 439 F. 3d 490, 496 (CA8 2006)). Second, the court stressed the absence of flagrant misconduct by Officer Fackrell, who was conducting a legitimate investigation of a suspected drug house.

Strieff conditionally pleaded guilty to reduced charges of attempted possession of a controlled substance and possession of drug paraphernalia, but reserved his right to appeal the trial court's denial of the suppression motion. The Utah Court of Appeals affirmed. 2012 UT App 245, 286 P. 3d 317.

The Utah Supreme Court reversed. 2015 UT 2, 357 P. 3d 532. It held that the evidence was inadmissible because only "a voluntary act of a defendant's free will (as in a confession or consent to search)" sufficiently breaks the connection between an illegal search and the discovery of evidence. *Id.*, at 536. Because Officer Fackrell's discovery of a valid arrest warrant did not fit this description, the court ordered the evidence suppressed. *Ibid.*

We granted certiorari to resolve disagreement about how the attenuation doctrine applies where an unconstitutional detention leads to the discovery of a valid arrest warrant. 576 U. S. 1094 (2015). Compare, *e. g., United States* v. *Green*, 111 F. 3d 515, 522–523 (CA7 1997) (holding that discovery of the warrant is a dispositive intervening circumstance where police misconduct was not flagrant), with, *e. g., State* v. *Moralez*, 297 Kan. 397, 415, 300 P. 3d 1090, 1102 (2013) (assigning little significance to the discovery of the warrant). We now reverse.

II

A

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Because officers who violated the Fourth Amendment were traditionally considered trespassers, individuals subject to unconstitutional searches or seizures historically enforced their rights through tort suits or self-help. Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 625 (1999). In the 20th century, however, the exclusionary rule—the rule that often requires trial courts to exclude unlawfully seized evidence in a criminal trial—became the principal judicial remedy to deter Fourth Amendment violations. See, *e. g., Mapp* v. *Ohio*, 367 U. S. 643, 655 (1961).

Under the Court's precedents, the exclusionary rule encompasses both the "primary evidence obtained as a direct result of an illegal search or seizure" and, relevant here, "evidence later discovered and found to be derivative of an illegality," the so-called " 'fruit of the poisonous tree.' " *Segura* v. *United States*, 468 U. S. 796, 804 (1984). But the significant costs of this rule have led us to deem it "applicable only . . . where its deterrence benefits outweigh its substantial social costs." *Hudson* v. *Michigan*, 547 U. S. 586, 591 (2006) (internal quotation marks omitted). "Suppression of evidence . . . has always been our last resort, not our first impulse." *Ibid.*

We have accordingly recognized several exceptions to the rule. Three of these exceptions involve the causal relationship between the unconstitutional act and the discovery of evidence. First, the independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source. See *Murray* v. *United States*, 487 U. S. 533, 537 (1988). Second, the inevitable discovery doctrine allows for the admission of evidence that would have been discovered even without the unconstitutional source. See *Nix* v. *Williams*, 467 U. S. 431, 443–444 (1984). Third, and at issue here, is the attenuation doctrine: Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." *Hudson*, *supra*, at 593.

B

Turning to the application of the attenuation doctrine to this case, we first address a threshold question: whether this doctrine applies at all to a case like this, where the intervening circumstance that the State relies on is the discovery of a valid, pre-existing, and untainted arrest warrant. The Utah Supreme Court declined to apply the attenuation doctrine because it read our precedents as applying the doctrine only "to circumstances involving an independent act of a defendant's 'free will' in confessing to a crime or consenting to a search." 357 P. 3d, at 544. In this Court, Strieff has not defended this argument, and we disagree with it, as well. The attenuation doctrine evaluates the causal link between the government's unlawful act and the discovery of evidence, which often has nothing to do with a defendant's actions.

And the logic of our prior attenuation cases is not limited to independent acts by the defendant.

It remains for us to address whether the discovery of a valid arrest warrant was a sufficient intervening event to break the causal chain between the unlawful stop and the discovery of drug-related evidence on Strieff's person. The three factors articulated in *Brown* v. *Illinois*, 422 U. S. 590 (1975), guide our analysis. First, we look to the "temporal proximity" between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search. *Id.*, at 603. Second, we consider "the presence of intervening circumstances." *Id.*, at 603–604. Third, and "particularly" significant, we examine "the purpose and flagrancy of the official misconduct." *Id.*, at 604. In evaluating these factors, we assume without deciding (because the State conceded the point) that Officer Fackrell lacked reasonable suspicion to initially stop Strieff. And, because we ultimately conclude that the warrant breaks the causal chain, we also have no need to decide whether the warrant's existence alone would make the initial stop constitutional even if Officer Fackrell was unaware of its existence.

1

The first factor, temporal proximity between the initially unlawful stop and the search, favors suppressing the evidence. Our precedents have declined to find that this factor favors attenuation unless "substantial time" elapses between an unlawful act and when the evidence is obtained. *Kaupp* v. *Texas*, 538 U. S. 626, 633 (2003) (*per curiam*). Here, however, Officer Fackrell discovered drug contraband on Strieff's person only minutes after the illegal stop. See App. 18–19. As the Court explained in *Brown*, such a short time interval counsels in favor of suppression; there, we found that the confession should be suppressed, relying in part on the "less than two hours" that separated the unconstitutional arrest and the confession. 422 U. S., at 604.

In contrast, the second factor, the presence of intervening circumstances, strongly favors the State. In *Segura*, 468 U. S. 796, the Court addressed similar facts to those here and found sufficient intervening circumstances to allow the admission of evidence. There, agents had probable cause to believe that apartment occupants were dealing cocaine. *Id.*, at 799–800. They sought a warrant. In the meantime, they entered the apartment, arrested an occupant, and discovered evidence of drug activity during a limited search for security reasons. *Id.*, at 800–801. The next evening, the Magistrate Judge issued the search warrant. *Ibid.* This Court deemed the evidence admissible notwithstanding the illegal search because the information supporting the warrant was "wholly unconnected with the [arguably illegal] entry and was known to the agents well before the initial entry." *Id.*, at 814.

Segura, of course, applied the independent source doctrine because the unlawful entry "did not contribute in any way to discovery of the evidence seized under the warrant." *Id.*, at 815. But the *Segura* Court suggested that the existence of a valid warrant favors finding that the connection between unlawful conduct and the discovery of evidence is "sufficiently attenuated to dissipate the taint." *Ibid.* That principle applies here.

In this case, the warrant was valid, it predated Officer Fackrell's investigation, and it was entirely unconnected with the stop. And once Officer Fackrell discovered the warrant, he had an obligation to arrest Strieff. "A warrant is a judicial mandate to an officer to conduct a search or make an arrest, and the officer has a sworn duty to carry out its provisions." *United States* v. *Leon*, 468 U. S. 897, 920, n. 21 (1984) (internal quotation marks omitted). Officer Fackrell's arrest of Strieff thus was a ministerial act that was independently compelled by the pre-existing warrant. And once Officer Fackrell was authorized to arrest Strieff, it was undisputedly lawful to search Strieff as an incident of his arrest to protect Officer Fackrell's safety. See *Arizona* v. *Gant*, 556 U. S. 332, 339 (2009) (explaining the permissible scope of searches incident to arrest).

Finally, the third factor, "the purpose and flagrancy of the official misconduct," *Brown, supra,* at 604, also strongly favors the State. The exclusionary rule exists to deter police misconduct. *Davis* v. *United States*, 564 U. S. 229, 236–237 (2011). The third factor of the attenuation doctrine reflects that rationale by favoring exclusion only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant.

Officer Fackrell was at most negligent. In stopping Strieff, Officer Fackrell made two good-faith mistakes. First, he had not observed what time Strieff entered the suspected drug house, so he did not know how long Strieff had been there. Officer Fackrell thus lacked a sufficient basis to conclude that Strieff was a short-term visitor who may have been consummating a drug transaction. Second, because he lacked confirmation that Strieff was a short-term visitor, Officer Fackrell should have asked Strieff whether he would speak with him, instead of demanding that Strieff do so. Officer Fackrell's stated purpose was to "find out what was going on [in] the house." App. 17. Nothing prevented him from approaching Strieff simply to ask. See *Florida* v. *Bostick*, 501 U. S. 429, 434 (1991) ("[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions"). But these errors in judgment hardly rise to a purposeful or flagrant violation of Strieff's Fourth Amendment rights.

While Officer Fackrell's decision to initiate the stop was mistaken, his conduct thereafter was lawful. The officer's decision to run the warrant check was a "negligibly burdensome precautio[n]" for officer safety. *Rodriguez* v. *United States*, 575 U. S. 348, 356 (2015). And Officer Fackrell's actual search of Strieff was a lawful search incident to arrest. See *Gant, supra,* at 339.

Moreover, there is no indication that this unlawful stop was part of any systemic or recurrent police misconduct. To the contrary, all the evidence suggests that the stop was an isolated instance of negligence that occurred in connection with a bona fide investigation of a suspected drug house. Officer Fackrell saw Strieff leave a suspected drug house. And his suspicion about the house was based on an anonymous tip and his personal observations.

Applying these factors, we hold that the evidence discovered on Strieff's person was admissible because the unlawful stop was sufficiently attenuated by the pre-existing arrest warrant. Although the illegal stop was close in time to Strieff's arrest, that consideration is outweighed by two factors supporting the State. The outstanding arrest warrant for Strieff's arrest is a critical intervening circumstance that is wholly independent of the illegal stop. The discovery of that warrant broke the causal chain between the unconstitutional stop and the discovery of evidence by compelling Officer Fackrell to arrest Strieff. And, it is especially significant that there is no evidence that Officer Fackrell's illegal stop reflected flagrantly unlawful police misconduct.

2

We find Strieff's counterarguments unpersuasive.

First, he argues that the attenuation doctrine should not apply because the officer's stop was purposeful and flagrant. He asserts that Officer Fackrell stopped him solely to fish for evidence of suspected wrongdoing. But Officer Fackrell sought information from Strieff to find out what was happening inside a house whose occupants were legitimately suspected of dealing drugs. This was not a suspicionless fishing expedition "in the hope that something would turn up." *Taylor* v. *Alabama*, 457 U. S. 687, 691 (1982).

Strieff argues, moreover, that Officer Fackrell's conduct was flagrant because he detained Strieff without the necessary level of cause (here, reasonable suspicion). But that conflates the standard for an illegal stop with the standard for flagrancy. For the violation to be flagrant, more severe police misconduct is required than the mere absence of proper cause for the seizure. See, *e. g., Kaupp*, 538 U. S., at 628, 633 (finding flagrant violation where a warrantless arrest was made in the arrestee's home after police were denied a warrant and at least some officers knew they lacked probable cause). Neither the officer's alleged purpose nor the flagrancy of the violation rise to a level of misconduct to warrant suppression.

Second, Strieff argues that, because of the prevalence of outstanding arrest warrants in many jurisdictions, police will engage in dragnet searches if the exclusionary rule is not applied. We think that this outcome is unlikely. Such wanton conduct would expose police to civil liability. See 42 U. S. C. § 1983; *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 690 (1978); see also *Segura*, 468 U. S., at 812. And in any event, the *Brown* factors take account of the purpose and flagrancy of police misconduct. Were evidence of a dragnet search presented here, the application of the *Brown* factors could be different. But there is no evidence that the concerns that Strieff raises with the criminal justice system are present in South Salt Lake City, Utah.

* * *

We hold that the evidence Officer Fackrell seized as part of his search incident to arrest is admissible because his discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to arrest. The judgment of the Utah Supreme Court, accordingly, is reversed.

It is so ordered.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins as to Parts I, II, and III, dissenting.

The Court today holds that the discovery of a warrant for an unpaid parking ticket will forgive a police officer's violation of your Fourth Amendment rights. Do not be soothed by the opinion's technical language: This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong. If the officer discovers a warrant for a fine you forgot to pay, courts will now excuse his illegal stop and will admit into evidence anything he happens to find by searching you after arresting you on the warrant. Because the Fourth Amendment should prohibit, not permit, such misconduct, I dissent.

I

Minutes after Edward Strieff walked out of a South Salt Lake City home, an officer stopped him, questioned him, and took his identification to run it through a police database. The officer did not suspect that Strieff had done anything wrong. Strieff just happened to be the first person to leave a house that the officer thought might contain "drug activity." App. 16–19.

As the State of Utah concedes, this stop was illegal. *Id.*, at 24. The Fourth Amendment protects people from "unreasonable searches and seizures." An officer breaches that protection when he detains a pedestrian to check his license without any evidence that the person is engaged in a crime. *Delaware* v. *Prouse,* 440 U. S. 648, 663 (1979); *Terry* v. *Ohio*, 392 U. S. 1, 21 (1968). The officer deepens the breach when he prolongs the detention just to fish further for evidence of wrongdoing. *Rodriguez* v. *United States*, 575 U. S. 348, 354–356 (2015). In his search for lawbreaking, the officer in this case himself broke the law.

The officer learned that Strieff had a "small traffic warrant." App. 19. Pursuant to that warrant, he arrested Strieff and, conducting a search incident to the arrest, discovered methamphetamine in Strieff's pockets.

Utah charged Strieff with illegal drug possession. Before trial, Strieff argued that admitting the drugs into evidence would condone the officer's misbehavior. The methamphetamine, he reasoned, was the product of the officer's illegal stop. Admitting it would tell officers that unlawfully discovering even a "small traffic warrant" would give them license to search for evidence of unrelated offenses. The Utah Supreme Court unanimously agreed with Strieff. A majority of this Court now reverses.

II

It is tempting in a case like this, where illegal conduct by an officer uncovers illegal conduct by a civilian, to forgive the officer. After all, his instincts, although unconstitutional, were correct. But a basic principle lies at the heart of the Fourth Amendment: Two wrongs don't make a right. See *Weeks* v. *United States*, 232 U. S. 383, 392 (1914). When "lawless police conduct" uncovers evidence of lawless civilian conduct, this Court has long required later criminal trials to exclude the illegally obtained evidence. *Terry*, 392 U. S., at 12; *Mapp* v. *Ohio*, 367 U. S. 643, 655 (1961). For example, if an officer breaks into a home and finds a forged check lying around, that check may not be used to prosecute the homeowner for bank fraud. We would describe the check as " 'fruit of the poisonous tree.' " *Wong Sun* v. *United States*, 371 U. S. 471, 488 (1963). Fruit that must be cast aside includes not only evidence directly found by an illegal search but also evidence "come at by exploitation of that illegality." *Ibid.*

This "exclusionary rule" removes an incentive for officers to search us without proper justification. *Terry*, 392 U. S., at 12. It also keeps courts from being "made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions." *Id.*, at 13. When courts admit only lawfully obtained evidence, they encourage "those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system." *Stone* v. *Powell*, 428 U. S. 465, 492 (1976). But when courts admit illegally obtained evidence as well, they reward "manifest neglect if not an open defiance of the prohibitions of the Constitution." *Weeks*, 232 U. S., at 394.

Applying the exclusionary rule, the Utah Supreme Court correctly decided that Strieff's drugs must be excluded because the officer exploited his illegal stop to discover them. The officer found the drugs only after learning of Strieff's traffic violation; and he learned of Strieff's traffic violation only because he unlawfully stopped Strieff to check his driver's license.

The court also correctly rejected the State's argument that the officer's discovery of a traffic warrant unspoiled the poisonous fruit. The State analogizes finding the warrant to one of our earlier decisions, *Wong Sun* v. *United States*. There, an officer illegally arrested a person who, days later, voluntarily returned to the station to confess to committing a crime. 371 U. S., at 491. Even though the person would not have confessed "but for the illegal actions of the police," *id.*, at 488, we noted that the police did not exploit their illegal arrest to obtain the confession, *id.*, at 491. Because the confession was obtained by "means sufficiently distinguishable" from the constitutional violation, we held that it could be admitted into evidence. *Id.*, at 488, 491. The State contends that the search incident to the warrant-arrest here is similarly distinguishable from the illegal stop.

But *Wong Sun* explains why Strieff's drugs must be excluded. We reasoned that a Fourth Amendment violation may not color every investigation that follows but it certainly stains the actions of officers who exploit the infraction. We distinguished evidence obtained by innocuous means from evidence obtained by exploiting misconduct after considering a variety of factors: whether a long time passed, whether there were "intervening circumstances," and whether the purpose or flagrancy of the misconduct was "calculated" to procure the evidence. *Brown* v. *Illinois*, 422 U. S. 590, 603–605 (1975).

These factors confirm that the officer in this case discovered Strieff's drugs by exploiting his own illegal conduct.

The officer did not ask Strieff to volunteer his name only to find out, days later, that Strieff had a warrant against him. The officer illegally stopped Strieff and immediately ran a warrant check. The officer's discovery of a warrant was not some intervening surprise that he could not have anticipated. Utah lists over 180,000 misdemeanor warrants in its database, and at the time of the arrest, Salt Lake County had a "backlog of outstanding warrants" so large that it faced the "potential for civil liability." See Dept. of Justice, Bureau of Justice Statistics, Survey of State Criminal History Information Systems, 2014 (2015) (Systems Survey) (Table 5a), online at https://www.ncjrs.gov/pdffiles1/bjs/grants/249799.pdf (all Internet materials as last visited June 16, 2016); Inst. for Law and Policy Planning, Salt Lake County Criminal Justice System Assessment 6.7 (2004), online at http://www.slco.org/cjac/resources/SaltLakeCJSAfinal.pdf. The officer's violation was also calculated to procure evidence. His sole reason for stopping Strieff, he acknowledged, was investigative—he wanted to discover whether drug activity was going on in the house Strieff had just exited. App. 17.

The warrant check, in other words, was not an "intervening circumstance" separating the stop from the search for drugs. It was part and parcel of the officer's illegal "expedition for evidence in the hope that something might turn up." *Brown*, 422 U. S., at 605. Under our precedents, because the officer found Strieff's drugs by exploiting his own constitutional violation, the drugs should be excluded.

III

A

The Court sees things differently. To the Court, the fact that a warrant gives an officer cause to arrest a person severs the connection between illegal policing and the resulting discovery of evidence. *Ante*, at 240. This is a remarkable proposition: The mere existence of a warrant not only gives an officer legal cause to arrest and search a person, it also forgives an officer who, with no knowledge of the warrant at all, unlawfully stops that person on a whim or hunch.

To explain its reasoning, the Court relies on *Segura* v. *United States*, 468 U. S. 796 (1984). There, federal agents applied for a warrant to search an apartment but illegally entered the apartment to secure it before the judge issued the warrant. *Id.*, at 800–801. After receiving the warrant, the agents then searched the apartment for drugs. *Id.*, at 801. The question before us was what to do with the evidence the agents then discovered. We declined to suppress it because "[t]he illegal entry into petitioners' apartment did not contribute in any way to discovery of the evidence seized under the warrant." *Id.*, at 815.

According to the majority, *Segura* involves facts "similar" to this case and "suggest[s]" that a valid warrant will clean up whatever illegal conduct uncovered it. *Ante,* at 240. It is difficult to understand this interpretation. In *Segura*, the agents' illegal conduct in entering the apartment had nothing to do with their procurement of a search warrant. Here, the officer's illegal conduct in stopping Strieff was essential to his discovery of an arrest warrant. *Segura* would be similar only if the agents used information they illegally obtained from the apartment to procure a search warrant or discover an arrest warrant. Precisely because that was not the case, the Court admitted the untainted evidence. 468 U. S., at 814.

The majority likewise misses the point when it calls the warrant check here a " 'negligibly burdensome precautio[n]' " taken for the officer's "safety." *Ante,* at 241 (quoting *Rodriguez,* 575 U. S., at 356). Remember, the officer stopped Strieff without suspecting him of committing any crime. By his own account, the officer did not fear Strieff. Moreover, the safety rationale we discussed in *Rodriguez,* an opinion about highway patrols, is conspicuously absent here. A warrant check on a highway "ensur[es] that vehicles on the road are operated safely and responsibly." *Id.*, at 355. We allow such checks during legal traffic stops because the legitimacy of a person's driver's license has a "close connection to roadway safety." *Id.*, at 356. A warrant check of a pedestrian on a sidewalk, "by contrast, is a measure aimed at 'detect[ing] evidence of ordinary criminal wrongdoing.'" *Id.*, at 355 (quoting *Indianapolis* v. *Edmond*, 531 U. S. 32, 40–41 (2000)). Surely we would not allow officers to warrant-check random joggers, dog walkers, and lemonade vendors just to ensure they pose no threat to anyone else.

The majority also posits that the officer could not have exploited his illegal conduct because he did not violate the Fourth Amendment on purpose. Rather, he made "good-faith mistakes." *Ante*, at 241. Never mind that the officer's sole purpose was to fish for evidence. The majority casts his unconstitutional actions as "negligent" and therefore incapable of being deterred by the exclusionary rule. *Ibid.*

But the Fourth Amendment does not tolerate an officer's unreasonable searches and seizures just because he did not know any better. Even officers prone to negligence can learn from courts that exclude illegally obtained evidence. *Stone*, 428 U. S., at 492. Indeed, they are perhaps the most in need of the education, whether by the judge's opinion, the prosecutor's future guidance, or an updated manual on criminal procedure. If the officers are in doubt about what the law requires, exclusion gives them an "incentive to err on the side of constitutional behavior." *United States* v. *Johnson*, 457 U. S. 537, 561 (1982).

B

Most striking about the Court's opinion is its insistence that the event here was "isolated," with "no indication that this unlawful stop was part of any systemic or recurrent police misconduct." *Ante*, at 242. Respectfully, nothing about this case is isolated.

Outstanding warrants are surprisingly common. When a person with a traffic ticket misses a fine payment or court appearance, a court will issue a warrant. See, *e. g.*, Brennan Center for Justice, Criminal Justice Debt 23 (2010), online at https://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf. When a person on probation drinks alcohol or breaks curfew, a court will issue a warrant. See, *e. g.*, Human Rights Watch, Profiting From Probation 1, 51 (2014), online at https://www.hrw.org/report/2014/02/05/profiting-probation/americas-offender-funded-probation-industry. The States and Federal Government maintain databases with over 7.8 million outstanding warrants, the vast majority of which appear to be for minor offenses. See Systems Survey (Table 5a). Even these sources may not track the "staggering" numbers of warrants, "'drawers and drawers'" full, that many cities issue for traffic violations and ordinance infractions. Dept. of Justice, Civil Rights Div., Investigation of the Ferguson Police Department 47, 55 (2015) (Ferguson Report), online at https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf. The county in this case has had a "backlog" of such warrants. See *supra*, at 247. The Department of Justice recently reported that in the town of Ferguson, Missouri, with a population of 21,000, 16,000 people had outstanding warrants against them. Ferguson Report, at 6, 55.

Justice Department investigations across the country have illustrated how these astounding numbers of warrants can be used by police to stop people without cause. In a single year in New Orleans, officers "made nearly 60,000 arrests, of which about 20,000 were of people with outstanding traffic or misdemeanor warrants from neighboring parishes for such infractions as unpaid tickets." Dept. of Justice, Civil Rights Div., Investigation of the New Orleans Police Department 29 (2011), online at https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf. In the St. Louis metropolitan area, officers "routinely" stop people—on the street, at bus stops, or even in court—for no reason other than "an officer's desire to check whether the subject had a municipal arrest warrant pending." Ferguson Report, at 11, 17. In Newark, New Jersey, officers stopped 52,235 pedestrians within a 4-year period and ran warrant checks on 39,308 of them. Dept. of Justice, Civil Rights Div., Investigation of the Newark Police Department 8, 19, n. 15 (2014), online at https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf. The Justice Department analyzed these warrant-checked stops and reported that "approximately 93% of the stops would have been considered unsupported by articulated reasonable suspicion." *Id.*, at 9, n. 7.

I do not doubt that most officers act in "good faith" and do not set out to break the law. That does not mean these stops are "isolated instance[s] of negligence," however. *Ante*, at 242. Many are the product of institutionalized training procedures. The New York City Police Department long trained officers to, in the words of a District Judge, "stop and question first, develop reasonable suspicion later." *Ligon* v. *New York*, 925 F. Supp. 2d 478, 537–538 (SDNY), stay granted on other grounds, 736 F. 3d 118 (CA2 2013). The Utah Supreme Court described as " 'routine procedure' or 'common practice' " the decision of Salt Lake City police officers to run warrant checks on pedestrians they detained without reasonable suspicion. *State* v. *Topanotes*, 2003 UT 30, ¶2, 76 P. 3d 1159, 1160. In the related context of traffic stops, one widely followed police manual instructs officers looking for drugs to "run at least a warrants check on all drivers you stop. Statistically, narcotics offenders are . . . more likely to fail to appear on simple citations, such as traffic or trespass violations, leading to the issuance of bench warrants. Discovery of an outstanding warrant gives you cause for an immediate custodial arrest and search of the suspect." C. Remsberg, Tactics for Criminal Patrol 205–206 (1995); C. Epp et al., Pulled Over 23, 33–36 (2014).

The majority does not suggest what makes this case "isolated" from these and countless other examples. Nor does it offer guidance for how a defendant can prove that his arrest was the result of "widespread" misconduct. Surely it should not take a federal investigation of Salt Lake County before the Court would protect someone in Strieff's position.

IV

Writing only for myself, and drawing on my professional experiences, I would add that unlawful "stops" have severe consequences much greater than the inconvenience suggested by the name. This Court has given officers an array of instruments to probe and examine you. When we condone officers' use of these devices without adequate cause, we give them reason to target pedestrians in an arbitrary manner. We also risk treating members of our communities as second-class citizens.

Although many Americans have been stopped for speeding or jaywalking, few may realize how degrading a stop can be when the officer is looking for more. This Court has allowed an officer to stop you for whatever reason he wants—so long as he can point to a pretextual justification after the fact. *Whren* v. *United States*, 517 U. S. 806, 813 (1996). That justification must provide specific reasons why the officer suspected you were breaking the law, *Terry*, 392 U. S., at 21, but it may factor in your ethnicity, *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 886–887 (1975), where you live, *Adams* v. *Williams*, 407 U. S. 143, 147 (1972), what you were wearing, *United States* v. *Sokolow*, 490 U. S. 1, 4–5 (1989), and how you behaved, *Illinois* v. *Wardlow*, 528 U. S. 119, 124–125 (2000). The officer does not even need to know which law you might have broken so long as he can later point to any possible infraction—even one that is minor, unrelated, or ambiguous. *Devenpeck* v. *Alford*, 543 U. S. 146, 154–155 (2004); *Heien* v. *North Carolina*, 574 U. S. 54 (2014).

The indignity of the stop is not limited to an officer telling you that you look like a criminal. See Epp, Pulled Over, at 5. The officer may next ask for your "consent" to inspect your bag or purse without telling you that you can decline. See *Florida* v. *Bostick*, 501 U. S. 429, 438 (1991). Regardless of your answer, he may order you to stand "helpless, perhaps facing a wall with [your] hands raised." *Terry*, 392 U. S., at 17. If the officer thinks you might be dangerous, he may then "frisk" you for weapons. This involves more than just a patdown. As onlookers pass by, the officer may " 'feel with sensitive fingers every portion of [your] body. A thorough search [may] be made of [your] arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.' " *Id.*, at 17, n. 13.

The officer's control over you does not end with the stop. If the officer chooses, he may handcuff you and take you to jail for doing nothing more than speeding, jaywalking, or "driving [your] pickup truck . . . with [your] 3-year-old son and 5-year-old daughter . . . without [your] seatbelt fastened." *Atwater* v. *Lago Vista*, 532 U. S. 318, 323–324 (2001). At the jail, he can fingerprint you, swab DNA from the inside of your mouth, and force you to "shower with a delousing agent" while you "lift [your] tongue, hold out [your] arms, turn around, and lift [your] genitals." *Florence* v. *Board of Chosen Freeholders of County of Burlington*, 566 U. S. 318, 323 (2012); *Maryland* v. *King*, 569 U. S. 435, 465–466 (2013). Even if you are innocent, you will now join the 65 million Americans with an arrest record and experience the "civil death" of discrimination by employers, landlords, and whoever else conducts a background check. Chin, The New Civil Death, 160 U. Pa. L. Rev. 1789, 1805 (2012); see J. Jacobs, The Eternal Criminal Record 33–51 (2015); Young & Petersilia, Keeping Track, 129 Harv. L. Rev. 1318, 1341–1357 (2016). And, of course, if you fail to pay bail or appear for court, a judge will issue a warrant to render you "arrestable on sight" in the future. A. Goffman, On the Run 196 (2014).

This case involves a *suspicionless* stop, one in which the officer initiated this chain of events without justification. As the Justice Department notes, *supra*, at 250–251, many innocent people are subjected to the humiliations of these unconstitutional searches. The white defendant in this case shows that anyone's dignity can be violated in this manner. See M. Gottschalk, Caught 119–138 (2015). But it is no secret that people of color are disproportionate victims of this type of scrutiny. See M. Alexander, The New Jim Crow 95–136 (2010). For generations, black and brown parents have given their children "the talk"—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them. See, *e. g.*, W. E. B. Du Bois, The Souls of Black Folk (1903); J. Baldwin, The Fire Next Time (1963); T. Coates, Between the World and Me (2015).

By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.

We must not pretend that the countless people who are routinely targeted by police are "isolated." They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. See L. Guinier & G. Torres, The Miner's Canary 274–283 (2002). They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but.

* * *

I dissent.

JUSTICE KAGAN, with whom JUSTICE GINSBURG joins, dissenting.

If a police officer stops a person on the street without reasonable suspicion, that seizure violates the Fourth Amendment. And if the officer pats down the unlawfully detained individual and finds drugs in his pocket, the State may not use the contraband as evidence in a criminal prosecution. That much is beyond dispute. The question here is whether the prohibition on admitting evidence dissolves if the officer discovers, after making the stop but before finding the drugs, that the person has an outstanding arrest warrant. Because that added wrinkle makes no difference under the Constitution, I respectfully dissent.

This Court has established a simple framework for determining whether to exclude evidence obtained through a Fourth Amendment violation: Suppression is necessary when, but only when, its societal benefits outweigh its costs. See *ante*, at 237; *Davis* v. *United States*, 564 U. S. 229, 237 (2011). The exclusionary rule serves a crucial function—to deter unconstitutional police conduct. By barring the use of illegally obtained evidence, courts reduce the temptation for police officers to skirt the Fourth Amendment's requirements. See *James* v. *Illinois*, 493 U. S. 307, 319 (1990). But suppression of evidence also "exacts a heavy toll": Its consequence in many cases is to release a criminal without just punishment. *Davis*, 564 U. S., at 237. Our decisions have thus endeavored to strike a sound balance between those two competing considerations—rejecting the "reflexive" impulse to exclude evidence every time an officer runs afoul of the Fourth Amendment, *id.*, at 238, but insisting on suppression when it will lead to "appreciable deterrence" of police misconduct, *Herring* v. *United States*, 555 U. S. 135, 141 (2009).

This case thus requires the Court to determine whether excluding the fruits of Officer Douglas Fackrell's unjustified stop of Edward Strieff would significantly deter police from committing similar constitutional violations in the future. And as the Court states, that inquiry turns on application of the "attenuation doctrine," *ante*, at 238—our effort to "mark the point" at which the discovery of evidence "become[s] so attenuated" from the police misconduct that the deterrent benefit of exclusion drops below its cost. *United States* v. *Leon*, 468 U. S. 897, 911 (1984). Since *Brown* v. *Illinois*, 422 U. S. 590, 604–605 (1975), three factors have guided that analysis. First, the closer the "temporal proximity" between the unlawful act and the discovery of evidence, the greater the deterrent value of suppression. *Id.*, at 603. Second, the more "purpose[ful]" or "flagran[t]" the police illegality, the clearer the necessity, and better the chance, of preventing similar misbehavior. *Id.*, at 604. And third, the presence (or absence) of "intervening circumstances" makes a difference: The stronger the causal chain between the misconduct and the evidence, the more exclusion will curb future constitutional violations. *Id.*, at 603–604. Here, as shown below, each of those considerations points toward suppression: Nothing in Fackrell's discovery of an outstanding warrant so attenuated the connection between his wrongful behavior and his detection of drugs as to diminish the exclusionary rule's deterrent benefits.

Start where the majority does: The temporal proximity factor, it forthrightly admits, "favors suppressing the evidence." *Ante*, at 239. After all, Fackrell's discovery of drugs came just minutes after the unconstitutional stop. And in prior decisions, this Court has made clear that only the lapse of "substantial time" between the two could favor admission. *Kaupp* v. *Texas*, 538 U. S. 626, 633 (2003) (*per curiam*); see, *e. g.*, *Brown*, 422 U. S., at 604 (suppressing a confession when "less than two hours" separated it from an unlawful arrest). So the State, by all accounts, takes strike one.

Move on to the purposefulness of Fackrell's conduct, where the majority is less willing to see a problem for what it is.

The majority chalks up Fackrell's Fourth Amendment violation to a couple of innocent "mistakes." *Ante*, at 241. But far from a Barney Fife-type mishap, Fackrell's seizure of Strieff was a calculated decision, taken with so little justification that the State has never tried to defend its legality. At the suppression hearing, Fackrell acknowledged that the stop was designed for investigatory purposes—*i. e.*, to "find out what was going on [in] the house" he had been watching, and to figure out "what [Strieff] was doing there." App. 17–18. And Fackrell frankly admitted that he had no basis for his action except that Strieff "was coming out of the house." *Id.*, at 17. Plug in Fackrell's and Strieff's names, substitute "stop" for "arrest" and "reasonable suspicion" for "probable cause," and this Court's decision in *Brown* perfectly describes this case:

> "[I]t is not disputed that [Fackrell stopped Strieff] without [reasonable suspicion]. [He] later testified that [he] made the [stop] for the purpose of questioning [Strieff] as part of [his] investigation . . . . The illegality here . . . had a quality of purposefulness. The impropriety of the [stop] was obvious. [A]wareness of that fact was virtually conceded by [Fackrell] when [he] repeatedly acknowledged, in [his] testimony, that the purpose of [his] action was 'for investigation': [Fackrell] embarked upon this expedition for evidence in the hope that something might turn up." 422 U. S., at 592, 605 (some internal punctuation altered; footnote, citation, and paragraph break omitted).

In *Brown*, the Court held those facts to support suppression—and they do here as well. Swing and a miss for strike two.

Finally, consider whether any intervening circumstance "br[oke] the causal chain" between the stop and the evidence. *Ante*, at 239. The notion of such a disrupting event comes from the tort law doctrine of proximate causation. See

Bridge v. *Phoenix Bond & Indemnity Co.*, 553 U. S. 639, 658–659 (2008) (explaining that a party cannot "establish[ ] proximate cause" when "an intervening cause break[s] the chain of causation between" the act and the injury); Kerr, Good Faith, New Law, and the Scope of the Exclusionary Rule, 99 Geo. L. J. 1077, 1099 (2011) (Fourth Amendment attenuation analysis "looks to whether the constitutional violation was the proximate cause of the discovery of the evidence"). And as in the tort context, a circumstance counts as intervening only when it is unforeseeable—not when it can be seen coming from miles away. See W. Keeton, D. Dobbs, B. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 312 (5th ed. 1984). For rather than breaking the causal chain, predictable effects (*e. g.*, X leads naturally to Y leads naturally to Z) are its very links.

And Fackrell's discovery of an arrest warrant—the only event the majority thinks intervened—was an eminently foreseeable consequence of stopping Strieff. As Fackrell testified, checking for outstanding warrants during a stop is the "normal" practice of South Salt Lake City police. App. 18; see also *State* v. *Topanotes*, 2003 UT 30, ¶2, 76 P. 3d 1159, 1160 (describing a warrant check as "routine procedure" and "common practice" in Salt Lake City). In other words, the department's standard detention procedures—stop, ask for identification, run a check—are partly designed to find outstanding warrants. And find them they will, given the staggering number of such warrants on the books. See generally *ante*, at 249–250 (SOTOMAYOR, J., dissenting). To take just a few examples: The State of California has 2.5 million outstanding arrest warrants (a number corresponding to about 9% of its adult population); Pennsylvania (with a population of about 12.8 million) contributes 1.4 million more; and New York City (population 8.4 million) adds another 1.2 million. See Reply Brief 8; Associated Press, Pa. Database, NBC News (Apr. 8, 2007), online at http://www.nbcnews.com/id/18013262/ns/us_news-crime_and_courts/t/pa-database-million-warrants-unserved/#.WejgRdVSxaQ (as last visited June 17, 2016); N. Y. Times, Oct. 8, 2015, p. A24.[1] So outstanding warrants do not appear as bolts from the blue. They are the run-of-the-mill results of police stops—what officers look for when they run a routine check of a person's identification and what they know will turn up with fair regularity. In short, they are nothing like what intervening circumstances are supposed to be.[2] Strike three.

The majority's misapplication of *Brown*'s three-part inquiry creates unfortunate incentives for the police—indeed, practically invites them to do what Fackrell did here. Consider an officer who, like Fackrell, wishes to stop someone for investigative reasons, but does not have what a court would view as reasonable suspicion. If the officer believes that any evidence he discovers will be inadmissible, he is likely to think the unlawful stop not worth making—precisely the deterrence the exclusionary rule is meant to achieve. But when he is told of today's decision? Now the officer knows that the stop may well yield admissible evi-

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[1] What is more, outstanding arrest warrants are not distributed evenly across the population. To the contrary, they are concentrated in cities, towns, and neighborhoods where stops are most likely to occur—and so the odds of any given stop revealing a warrant are even higher than the above numbers indicate. One study found, for example, that Cincinnati, Ohio had over 100,000 outstanding warrants with only 300,000 residents. See Helland & Tabarrok, The Fugitive: Evidence on Public Versus Private Law Enforcement From Bail Jumping, 47 J. Law & Econ. 93, 98 (2004). And as JUSTICE SOTOMAYOR notes, 16,000 of the 21,000 people residing in the town of Ferguson, Missouri have outstanding warrants. See *ante*, at 250.

[2] The majority relies on *Segura* v. *United States*, 468 U. S. 796 (1984), to reach the opposite conclusion, see *ante*, at 240–241, but that decision lacks any relevance to this case. The Court there held that the Fourth Amendment violation at issue "did not contribute in any way" to the police's subsequent procurement of a warrant and discovery of contraband. 468 U. S., at 815. So the Court had no occasion to consider the question here: What happens when an unconstitutional act in fact leads to a warrant which then leads to evidence?

dence: So long as the target is one of the many millions of people in this country with an outstanding arrest warrant, anything the officer finds in a search is fair game for use in a criminal prosecution. The officer's incentive to violate the Constitution thus increases: From here on, he sees potential advantage in stopping individuals without reasonable suspicion—exactly the temptation the exclusionary rule is supposed to remove. Because the majority thus places Fourth Amendment protections at risk, I respectfully dissent.

CUOZZO SPEED TECHNOLOGIES, LLC *v.* LEE, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR, PATENT AND TRADEMARK OFFICE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 15–446. Argued April 25, 2016—Decided June 20, 2016

The Leahy-Smith America Invents Act creates an agency procedure called "inter partes review" that allows a third party to ask the U. S. Patent and Trademark Office to reexamine the claims in an already-issued patent and to cancel any claim that the agency finds to be unpatentable in light of prior art. The Act, as relevant here, provides that the Patent Office's decision "whether to institute an inter partes review . . . shall be final and nonappealable," 35 U. S. C. § 314(d), and grants the Patent Office authority to issue "regulations . . . establishing and governing inter partes review," § 316(a)(4). A Patent Office regulation issued pursuant to that authority provides that, during inter partes review, a patent claim "shall be given its broadest reasonable construction in light of the specification of the patent in which it appears." 37 CFR § 42.100(b).

In 2012, Garmin International, Inc., and Garmin USA, Inc., sought inter partes review of all 20 claims of a patent held by petitioner Cuozzo Speed Technologies, LLC, asserting, among other things, that claim 17 was obvious in light of three prior patents. The Patent Office agreed to review claim 17. It also decided to reexamine claims 10 and 14 on that same ground because it determined those claims to be logically linked to the obviousness challenge to claim 17. The Patent Office, through its Patent Trial and Appeal Board, concluded that the claims were obvious in light of prior art, denied for reasons of futility Cuozzo's motion to amend the claims, and canceled all three claims.

Cuozzo appealed to the Federal Circuit. Cuozzo claimed that the Patent Office improperly instituted inter partes review with respect to claims 10 and 14, and it alleged that the Board improperly used the "broadest reasonable construction" standard to interpret the claims rather than the standard used by courts, which gives claims their "ordinary meaning . . . as understood by a person of skill in the art," *Phillips* v. *AWH Corp.*, 415 F. 3d 1303, 1314. The Federal Circuit rejected both arguments. It reasoned that § 314(d) made the Patent Office's decision to institute inter partes review "nonappealable," and it concluded that the Patent Office's regulation was a reasonable exercise of the agency's rulemaking authority.

Held:

1. Section 314(d) bars Cuozzo's challenge to the Patent Office's decision to institute inter partes review. Pp. 271–276.

(a) The text of § 314(d) expressly states that the Patent Office's determinations whether to institute inter partes review "shall be *final and nonappealable*." (Emphasis added.) Moreover, construing § 314(d) to permit judicial review of the Patent Office's preliminary decision to institute inter partes review undercuts the important congressional objective of giving the agency significant power to revisit and revise earlier patent grants. Past practice in respect to related proceedings, including the predecessor to inter partes review, also supports the conclusion that Congress did not intend for courts to review these initial determinations. Finally, reading § 314(d) as limited to interlocutory appeals would render the provision largely superfluous in light of the Administrative Procedure Act. Pp. 271–273.

(b) The "strong presumption" favoring judicial review, *Mach Mining, LLC* v. *EEOC*, 575 U. S. 480, 486, is overcome here by these " 'clear and convincing' " indications that Congress intended to bar review, *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 349. Given that presumption, however, the interpretation adopted here applies to cases in which the challenge is to the Patent Office's determination "to initiate an inter partes review *under this section*," or where the challenge consists of questions closely tied to the application and interpretation of statutes related to that determination. Cuozzo's claim does not implicate a constitutional question, nor does it present other questions of interpretation that reach well beyond "this section" in terms of scope and impact. Rather, Cuozzo's allegation that Garmin's petition did not plead "with particularity" the challenge to claims 10 and 14 as required by § 312 is little more than a challenge to the Patent Office's conclusion under § 314(a) that the "information presented in the petition" warranted review. Pp. 273–276.

2. The Patent Office regulation requiring the Board to apply the broadest reasonable construction standard to interpret patent claims is a reasonable exercise of the rulemaking authority granted to the Patent Office by statute. Pp. 276–283.

(a) Where a statute leaves a gap or is ambiguous, this Court typically interprets a congressional grant of rulemaking authority as giving the agency leeway to enact rules that are reasonable in light of the text, nature, and purpose of the statute. *United States* v. *Mead Corp.*, 533 U. S. 218, 229; *Chevron U. S. A. Inc.* v. *Natural Resources Defense*

Council, Inc., 467 U. S. 837, 842–843. Here, the statute grants the Patent Office the authority to issue regulations "governing inter partes review," and no statutory provision unambiguously mandates a particular claim construction standard.

The Patent Office's rulemaking authority is not limited to procedural regulations. Analogies to interpretations of other congressional grants of rulemaking authority in other statutes, which themselves do not unambiguously contain a limitation to procedural rules, cannot magically render unambiguous the different language in the different statutory grant of rulemaking authority at issue.

The nature and purpose of inter partes review does not unambiguously require the Patent Office to apply one particular claim construction standard. Cuozzo's contention that the purpose of inter partes review—to establish trial-like procedures for reviewing previously issued patents—supports the application of the ordinary meaning standard ignores the fact that in other significant respects, inter partes review is less like a judicial proceeding and more like a specialized agency proceeding. This indicates that Congress designed a hybrid proceeding. The purpose of inter partes review is not only to resolve patent-related disputes among parties, but also to protect the public's "paramount interest in seeing that patent monopolies . . . are kept within their legitimate scope." *Precision Instrument Mfg. Co.* v. *Automotive Maintenance Machinery Co.*, 324 U. S. 806, 816. Neither the statute's language, nor its purpose, nor its legislative history suggests that Congress decided what standard should apply in inter partes review. Pp. 276–280.

(b) The regulation is a reasonable exercise of the Patent Office's rulemaking authority. The broadest reasonable construction standard helps ensure precision in drafting claims and prevents a patent from tying up too much knowledge, which, in turn, helps members of the public draw useful information from the disclosed invention and understand the lawful limits of the claim. The Patent Office has used this standard for more than 100 years and has applied it in proceedings which, as here, resemble district court litigation.

Cuozzo's two arguments in response are unavailing. Applying the broadest reasonable construction standard in inter partes review is not, as Cuozzo suggests, unfair to a patent holder, who may move to amend at least once in the review process, and who has had several opportunities to amend in the original application process. And though the application of one standard in inter partes review and another in district court proceedings may produce inconsistent outcomes, that structure is inherent to Congress' regulatory design, and it is also consistent with past practice, as the patent system has long provided different tracks for the review and adjudication of patent claims. The Patent Office's regulation is reasonable, and this Court does not decide whether a better alternative exists as a matter of policy. Pp. 280–283.

793 F. 3d 1268, affirmed.

Breyer, J., delivered the opinion for a unanimous Court with respect to Parts I and III, and the opinion of the Court with respect to Part II, in which Roberts, C. J., and Kennedy, Thomas, Ginsburg, and Kagan, JJ., joined. Thomas, J., filed a concurring opinion, *post,* p. 286. Alito, J., filed an opinion concurring in part and dissenting in part, in which Sotomayor, J., joined, *post,* p. 287.

Garrard R. Beeney argued the cause for petitioner. With him on the briefs was *Jeffrey B. Wall.*

Curtis E. Gannon argued the cause for respondent. With him on the brief were *Solicitor General Verrilli, Principal Deputy Assistant Attorney General Mizer, Deputy Solicitor General Stewart, Deputy Assistant Attorney General Brinkmann, Mark R. Freeman, Melissa N. Patterson, Thomas W. Krause, Scott C. Weidenfeller,* and *Robert J. McManus.**

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*Briefs of *amici curiae* urging reversal were filed for the Biotechnology Innovation Organization et al. by *William M. Jay*; for the Federal Circuit Bar Association by *Morgan Chu, Joseph M. Lipner,* and *Edgar H. Haug*; for Intellectual Ventures Management LLC by *Eric F. Citron* and *Thomas C. Goldstein*; for Interdigital, Inc., et al. by *Richard P. Bress, Gabriel K. Bell, Jeffrey A. Birchak, Sriranga R. Veeraraghavan,* and *Andrew G. Isztwan*; for Mitchell Hamline School of Law Intellectual Property Institute by *R. Carl Moy*; for Patent-Practicing Technology Innovations by *Neal Kumar Katyal* and *Eugene A. Sokoloff*; for the Pharmaceutical Research and Manufacturers of America by *Pratik A. Shah, Emily C. Johnson, Z. W. Julius Chen, James M. Spears, David E. Korn,* and *Melissa B. Kimmel*; for SightSought Technologies, LLC, by *Matthew M. Wolf, Jennifer Sklenar,* and *Sean M. Callagy*; for 3M Co. et al. by *Barbara A. Fiacco* and *Donald R. Ware*; and for Gregory Dolin et al. by *Leslie V. Payne* and *Miranda Y. Jones*.

Briefs of *amici curiae* urging affirmance were filed for AARP by *Barbara Jones* and *William Alvarado Rivera*; for the American Bankers Association et al. by *Adam H. Charnes, Steven Gardner,* and *Chris W. Haaf*; for Apple, Inc., by *Joseph R. Guerra* and *Jeffrey P. Kushan*; for CME

JUSTICE BREYER delivered the opinion of the Court.

The Leahy-Smith America Invents Act, 35 U. S. C. § 100 *et seq.*, creates a process called "inter partes review." That review process allows a third party to ask the U. S. Patent and Trademark Office to reexamine the claims in an already-issued patent and to cancel any claim that the agency finds to be unpatentable in light of prior art. See § 102 (requiring "novel[ty]"); § 103 (disqualifying claims that are "obvious").

We consider two provisions of the Act. The first says:

> "No Appeal.—The determination by the Director [of the Patent Office] whether to institute an inter partes review under this section shall be final and nonappealable." § 314(d).

Group, Inc., by *Michael Hawes*, *Aaron M. Streett*, and *Jennifer L. Nall*; for Dell et al. by *John Thorne*, *Gregory G. Rapawy*, *Anthony Peterman*, and *Michele K. Connors*; for EMC Corp. by *Thomas G. Hungar*, *Matthew D. McGill*, *Alexander N. Harris*, *Paul T. Dacier*, *Krishnendu Gupta*, and *Thomas A. Brown*; for Generic Pharmaceutical Association et al. by *Chad Ruback*; for Mylan Pharmaceuticals Inc. by *Joseph J. Gleason*; for Public Knowledge by *Charles Duan*; and for Unified Patents Inc. by *Scott A. McKeown*, *Stephen G. Kunin*, and *Jeffrey I. Frey*.

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *Herbert D. Hart III* and *Lisa K. Jorgenson*; for the Association of the Bar of the City of New York by *John Gladstone Mills III*, *Aaron L. J. Pereira*, and *Timothy P. Heaton*; for the Intellectual Property Law Association of Chicago by *David L. Applegate* and *Charles W. Shifley*; for the Intellectual Property Owners Association by *D. Bartley Eppenauer*, *Lynn H. Murray*, *Rachel Smith*, *Kevin H. Rhodes*, and *Steven W. Miller*; for International Business Machines Corp. by *Paul D. Clement*, *D. Zachary Hudson*, and *Marian Underweiser*; for the Licensing Executives Society (U. S. A. and Canada), Inc., by *Mr. Shifley*; for Medtronic, Inc., by *Mark C. Fleming*, *Gregory H. Lantier*, *Joshua M. Koppel*, and *Daniel W. McDonald*; for Microsoft Corp. et al. by *John D. Vandenberg* and *Isabella Fu*; for the National Association of Patent Practitioners, Inc., by *William B. Richards* and *Louis J. Hoffman*; for the New York Intellectual Property Law Association by *Eugene M. Gelernter*, *Irena Royzman*, *Jason R. Vitullo*, *Charles R. Macedo*, and *David Goldberg*; and for Paul R. Michel by *Charles Hieken* and *John A. Dragseth*.

Does this provision bar a court from considering whether the Patent Office wrongly "determin[ed] . . . to institute an inter partes review," *ibid.*, when it did so on grounds not specifically mentioned in a third party's review request?

The second provision grants the Patent Office the authority to issue

> "regulations . . . establishing and governing inter partes review under this chapter." § 316(a)(4).

Does this provision authorize the Patent Office to issue a regulation stating that the agency, in inter partes review,

> "shall [construe a patent claim according to] its broadest reasonable construction in light of the specification of the patent in which it appears"? 37 CFR § 42.100(b) (2015).

We conclude that the first provision, though it may not bar consideration of a constitutional question, for example, does bar judicial review of the kind of mine-run claim at issue here, involving the Patent Office's decision to institute inter partes review. We also conclude that the second provision authorizes the Patent Office to issue the regulation before us. See, *e. g., United States* v. *Mead Corp.*, 533 U. S. 218, 229 (2001); *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842 (1984).

I

A

An inventor obtains a patent by applying to the Patent Office. A patent examiner with expertise in the relevant field reviews an applicant's patent claims, considers the prior art, and determines whether each claim meets the applicable patent law requirements. See, *e. g.,* 35 U. S. C. §§ 101, 102, 103, 112. Then, the examiner accepts a claim, or rejects it and explains why. See § 132(a).

If the examiner rejects a claim, the applicant can resubmit a narrowed (or otherwise modified) claim, which the examiner will consider anew, measuring the new claim against the same patent law requirements. If the examiner rejects the new claim, the inventor typically has yet another chance to respond with yet another amended claim. Ultimately, the Patent Office makes a final decision allowing or rejecting the application. The applicant may seek judicial review of any final rejection. See §§ 141(a), 145.

For several decades, the Patent Office has also possessed the authority to reexamine—and perhaps cancel—a patent claim that it had previously allowed. In 1980, for example, Congress enacted a statute providing for "ex parte reexamination." Act to Amend the Patent and Trademark Laws, 35 U. S. C. § 301 *et seq.* That statute (which remains in effect) gives "[a]ny person at any time" the right to "file a request for reexamination" on the basis of certain prior art "bearing on the patentability" of an already-issued patent. §§ 301(a)(1), 302. If the Patent Office concludes that the cited prior art raises "a substantial new question of patentability," the agency can reexamine the patent. § 303(a). And that reexamination can lead the Patent Office to cancel the patent (or some of its claims). Alternatively, the Director of the Patent Office can, on her "own initiative," trigger such a proceeding. *Ibid.* And, as with examination, the patent holder can seek judicial review of an adverse final decision. § 306.

In 1999 and 2002, Congress enacted statutes that established another, similar procedure, known as "inter partes *reexamination*." Those statutes granted third parties greater opportunities to participate in the Patent Office's reexamination proceedings as well as in any appeal of a Patent Office decision. See, *e. g.*, American Inventors Protection Act of 1999, § 297 *et seq.* (2006 ed.) (superseded).

In 2011, Congress enacted the statute before us. That statute modifies "inter partes *reexamination*," which it now calls "inter partes *review*." See H. R. Rep. No. 112–98, pt. 1, pp. 46–47 (2011) (H. R. Rep.). Like inter partes reexamination, any third party can ask the agency to initiate inter partes review of a patent claim. But the new statute has changed the standard that governs the Patent Office's institution of the agency's process. Instead of requiring that a request for reexamination raise a "substantial new question of patentability," it now requires that a petition show "a reasonable likelihood that" the challenger "would prevail." Compare § 312(a) (2006 ed.) (repealed) with § 314(a) (2012 ed.).

The new statute provides a challenger with broader participation rights. It creates within the Patent Office a Patent Trial and Appeal Board (Board) composed of administrative patent judges, who are patent lawyers and former patent examiners, among others. § 6. That Board conducts the proceedings, reaches a conclusion, and sets forth its reasons. See *ibid.*

The statute sets forth time limits for completing this review. § 316(a)(11). It grants the Patent Office the authority to issue rules. § 316(a)(4). Like its predecessors, the statute authorizes judicial review of a "final written decision" canceling a patent claim. § 319. And the statute says that the agency's initial decision "whether to institute an inter partes review" is "final and nonappealable." § 314(d); compare *ibid.* with §§ 312(a), (c) (2006 ed.) (repealed) (the "determination" that a petition for inter partes reexamination "raise[s]" "a substantial new question of patentability" is "final and non-appealable"), and § 303(c) (2012 ed.) (similar in respect to *ex parte* reexamination).

B

In 2002, Giuseppe A. Cuozzo applied for a patent covering a speedometer that will show a driver when he is driving above the speed limit. To understand the basic idea, think of the fact that a white speedometer needle will look red when it passes under a translucent piece of red glass or the equivalent (say, red cellophane). If you attach a piece of red glass or red cellophane to a speedometer beginning at 65 miles per hour, then, when the white needle passes that point, it will look red. If we attach the red glass to a plate that can itself rotate, if we attach the plate to the speedometer, if we connect the plate to a Global Positioning System (GPS) receiver, and if we enter onto a chip or a disk all the speed limits on all the Nation's roads, then the GPS can signal where the car is, the chip or disk can signal the speed limit at that place, and the plate can rotate to the right number on the speedometer. Thus, if the speed limit is 35 miles per hour, then the white speedometer needle will pass under the red plate at 35, not 65, and the driver will know if he is driving too fast.

In 2004, the Patent Office granted the patent. See U. S. Patent No. 6,778,074 (Cuozzo Patent). The Appendix contains excerpts from this patent, offering a less simplified (and more technical) description.

C

Petitioner Cuozzo Speed Technologies, LLC (Cuozzo), now holds the rights to the Cuozzo Patent. In 2012, Garmin International, Inc., and Garmin USA, Inc., filed a petition seeking inter partes review of the Cuozzo Patent's 20 claims. Garmin backed up its request by stating, for example, that the invention described in claim 17 was obvious in light of three prior patents, the Aumayer, Evans, and Wendt patents. U. S. Patent No. 6,633,811; U. S. Patent No. 3,980,041; and U. S. Patent No. 2,711,153. Cf. *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac Co.*, 321 U. S. 275, 280 (1944) (Black, J., dissenting) ("[S]omeone, somewhere, sometime, made th[is] discovery [but] I cannot agree that this patentee is that discoverer").

The Board agreed to reexamine claim 17, as well as claims 10 and 14. The Board recognized that Garmin had not expressly challenged claim 10 and claim 14 on the same obviousness ground. But, believing that "claim 17 depends on claim 14 which depends on claim 10," the Board reasoned that Garmin had "implicitly" challenged claims 10 and 14 on the basis of the same prior inventions, and it consequently decided to review all three claims together. App. to Pet. for Cert. 188a.

After proceedings before the Board, it concluded that claims 10, 14, and 17 of the Cuozzo Patent were obvious in light of the earlier patents to which Garmin had referred. The Board explained that the Aumayer patent "makes use of a GPS receiver to determine . . . the applicable speed limit at that location for display," the Evans patent "describes a colored plate for indicating the speed limit," and the Wendt patent "describes us[ing] a rotatable pointer for indicating the applicable speed limit." *Id.*, at 146a–147a. Anyone, the Board reasoned, who is "not an automaton"—anyone with "ordinary skill" and "ordinary creativity"—could have taken the automated approach suggested by the Aumayer patent and applied it to the manually adjustable signals described in the Evans and Wendt patents. *Id.*, at 147a. The Board also concluded that Cuozzo's proposed amendments would not cure this defect, *id.*, at 164a–166a, and it consequently denied Cuozzo's motion to amend its claims. Ultimately, it ordered claims 10, 14, and 17 of the Cuozzo Patent canceled, *id.*, at 166a.

Cuozzo appealed to the United States Court of Appeals for the Federal Circuit. Cuozzo argued that the Patent Office improperly instituted inter partes review, at least in respect to claims 10 and 14, because the agency found that Garmin had only *implicitly* challenged those two claims on the basis of the Aumayer, Evans, and Wendt patents, while the statute required petitions to set forth the grounds for challenge "with particularity." § 312(a)(3). Cuozzo also argued that the Board, when construing the claims, improperly used the interpretive standard set forth in the Patent Office's regulation (*i. e.*, it gave those claims their "broadest reasonable construction," 37 CFR § 42.100(b)), when it should have applied the standard that courts normally use when judging a patent's validity (*i. e.*, it should have given those claims their "ordinary meaning . . . as understood by a person of skill in the art," *Phillips* v. *AWH Corp.*, 415 F. 3d 1303, 1314 (CA Fed. 2005) (en banc)).

A divided panel of the Court of Appeals rejected both arguments. First, the panel majority pointed out that 35 U. S. C. § 314(d) made the decision to institute inter partes review "nonappealable." *In re Cuozzo Speed Technologies, LLC*, 793 F. 3d 1268, 1273 (CA Fed. 2015) (internal quotation marks omitted). Second, the panel majority affirmed the application of the broadest reasonable construction standard on the ground (among others) that the regulation was a reasonable, and hence lawful, exercise of the Patent Office's statutorily granted rulemaking authority. *Id.*, at 1278–1279; see § 314(a)(4). By a vote of 6 to 5, the Court of Appeals denied Cuozzo's petition for rehearing en banc. *In re Cuozzo Speed Technologies, LLC*, 793 F. 3d 1297, 1298 (CA Fed. 2015).

We granted Cuozzo's petition for certiorari to review these two questions.

II

Like the Court of Appeals, we believe that Cuozzo's contention that the Patent Office unlawfully initiated its agency review is not appealable. For one thing, that is what § 314(d) says. It states that the "determination by the [Patent Office] whether to institute an inter partes review under this section shall be *final and nonappealable.*" (Emphasis added.)

For another, the legal dispute at issue is an ordinary dispute about the application of certain relevant patent statutes concerning the Patent Office's decision to institute inter partes review. Cuozzo points to a related statutory section, § 312, which says that petitions must be pleaded "with particularity." Those words, in its view, mean that the petition should have specifically said that claims 10 and 14 are also obvious in light of this same prior art. Garmin's petition, the Government replies, need not have mentioned claims 10 and 14 separately, for claims 10, 14, and 17 are all logically linked; the claims "rise and fall together," and a petition need not simply repeat the same argument expressly when it is so obviously implied. See 793 F. 3d, at 1281. In our view, the "No Appeal" provision's language must, at the least, forbid an appeal that attacks a "determination . . . whether to institute" review by raising this kind of legal question and little more. § 314(d).

Moreover, a contrary holding would undercut one important congressional objective, namely, giving the Patent Office significant power to revisit and revise earlier patent grants. See H. R. Rep., at 45, 48 (explaining that the statute seeks to "improve patent quality and restore confidence in the presumption of validity that comes with issued patents"); 157 Cong. Rec. 9778 (2011) (remarks of Rep. Goodlatte) (noting that inter partes review "screen[s] out bad patents while bolstering valid ones"). We doubt that Congress would have granted the Patent Office this authority, including, for example, the ability to continue proceedings even after the original petitioner settles and drops out, § 317(a), if it had thought that the agency's final decision could be unwound under some minor statutory technicality related to its preliminary decision to institute inter partes review.

Further, the existence of similar provisions in this, and related, patent statutes reinforces our conclusion. See § 319 (limiting appellate review to the "final written decision"); § 312(c) (2006 ed.) (repealed) (the "determination" that a petition for inter partes *reexamination* "raise[s]" a "substantial new question of patentability" is "final and non-appealable"); see also § 303(c) (2012 ed.); *In re Hiniker Co.*, 150 F. 3d 1362, 1367 (CA Fed. 1998) ("Section 303 . . . is directed toward the [Patent Office's] authority to institute a reexamination, and there is no provision granting us direct review of that decision").

The dissent, like the panel dissent in the Court of Appeals, would limit the scope of the "No Appeal" provision to *inter-*

locutory appeals, leaving a court free to review the initial decision to institute review in the context of the agency's final decision. *Post,* at 287, 290–291 (ALITO, J., concurring in part and dissenting in part); 793 F. 3d, at 1291 (Newman, J., dissenting). We cannot accept this interpretation. It reads into the provision a limitation (to interlocutory decisions) that the language nowhere mentions and that is unnecessary. The Administrative Procedure Act already limits review to final agency decisions. 5 U. S. C. § 704. The Patent Office's decision to initiate inter partes review is "preliminary," not "final." *Ibid.* And the agency's decision to deny a petition is a matter committed to the Patent Office's discretion. See § 701(a)(2); 35 U. S. C. § 314(a) (no mandate to institute review); see also *post,* at 294, and n. 6. So, read as limited to such preliminary and discretionary decisions, the "No Appeal" provision would seem superfluous. The dissent also suggests that its approach is a "familiar practice," consistent with other areas of law. *Post*, at 293. But the kind of initial determination at issue here—that there is a "reasonable likelihood" that the claims are unpatentable on the grounds asserted—is akin to decisions which, in other contexts, we have held to be unreviewable. See *Kaley* v. *United States*, 571 U. S. 320, 328 (2014) ("The grand jury gets to say—without any review, oversight, or second-guessing—whether probable cause exists to think that a person committed a crime").

We recognize the "strong presumption" in favor of judicial review that we apply when we interpret statutes, including statutes that may limit or preclude review. *Mach Mining, LLC* v. *EEOC*, 575 U. S. 480, 486 (2015) (internal quotation marks omitted). This presumption, however, may be overcome by "'clear and convincing'" indications, drawn from "specific language," "specific legislative history," and "inferences of intent drawn from the statutory scheme as a whole," that Congress intended to bar review. *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 349–350 (1984). That standard is met here. The dissent disagrees, and it points to *Lindahl* v. *Office of Personnel Management*, 470 U. S. 768

(1985), to support its view that, in light of this presumption, § 314(d) should be read to permit judicial review of any issue bearing on the Patent Office's preliminary decision to institute inter partes review. See *post*, at 289–291. *Lindahl* is a case about the judicial review of disability determinations for federal employees. We explained that a statute directing the Office of Personnel Management to " 'determine questions of disability,' " and making those decisions " 'final,' " " 'conclusive,' " and " 'not subject to review,' " barred a court from revisiting the "factual underpinnings of . . . disability determinations"—though it permitted courts to consider claims alleging, for example, that the Office of Personnel Management " 'substantial[ly] depart[ed] from important procedural rights.' " 470 U. S., at 771, 791. Thus, *Lindahl*'s interpretation of that statute preserved the agency's primacy over its core statutory function in accord with Congress' intent. Our interpretation of the "No Appeal" provision here has the same effect. Congress has told the *Patent Office* to determine whether inter partes review should proceed, and it has made the agency's decision "final" and "nonappealable." § 314(d). Our conclusion that courts may not revisit this initial determination gives effect to this statutory command. Moreover, *Lindahl*'s conclusion was consistent with prior judicial practice in respect to those factual agency determinations, and legislative history "strongly suggest[ed]" that Congress intended to preserve this prior practice. *Id.*, at 785. These features, as explained above, also support our interpretation: The text of the "No Appeal" provision, along with its place in the overall statutory scheme, its role alongside the Administrative Procedure Act, the prior interpretation of similar patent statutes, and Congress' purpose in crafting inter partes review, all point in favor of precluding review of the Patent Office's institution decisions.

Nevertheless, in light of § 314(d)'s own text and the presumption favoring review, we emphasize that our interpretation applies where the grounds for attacking the decision to institute inter partes review consist of questions that are closely tied to the application and interpretation of statutes related to the Patent Office's decision to initiate inter partes review. See § 314(d) (barring appeals of "determinations . . . to initiate an inter partes review *under this section*" (emphasis added)). This means that we need not, and do not, decide the precise effect of § 314(d) on appeals that implicate constitutional questions, that depend on other less closely related statutes, or that present other questions of interpretation that reach, in terms of scope and impact, well beyond "this section." Cf. *Johnson* v. *Robison*, 415 U. S. 361, 367 (1974) (statute precluding review of "any question of law or fact under any law administered by the Veterans' Administration" does not bar review of constitutional challenges (emphasis deleted and internal quotation marks omitted)); *Traynor* v. *Turnage*, 485 U. S. 535, 544–545 (1988) (that same statute does not bar review of decisions made under different statutes enacted at other times). Thus, contrary to the dissent's suggestion, we do not categorically preclude review of a final decision where a petition fails to give "sufficient notice" such that there is a due process problem with the entire proceeding, nor does our interpretation enable the agency to act outside its statutory limits by, for example, canceling a patent claim for "indefiniteness under § 112" in inter partes review. *Post*, at 296–299. Such "shenanigans" may be properly reviewable in the context of § 319 and under the Administrative Procedure Act, which enables reviewing courts to "set aside agency action" that is "contrary to constitutional right," "in excess of statutory jurisdiction," or "arbitrary [and] capricious." Compare *post*, at 298, with 5 U. S. C. §§ 706(2)(A)–(D).

By contrast, where a patent holder merely challenges the Patent Office's "determin[ation] that the information presented in the petition . . . shows that there is a reasonable likelihood" of success "with respect to at least 1 of the claims challenged," § 314(a), or where a patent holder grounds its claim in a statute closely related to that decision to institute inter partes review, § 314(d) bars judicial review. In this case, Cuozzo's claim that Garmin's petition was not pleaded "with particularity" under § 312 is little more than a challenge to the Patent Office's conclusion, under § 314(a), that the "information presented in the petition" warranted review. Cf. *United States* v. *Williams*, 504 U. S. 36, 54 (1992) ("A complaint about the quality or adequacy of the evidence can always be recast as a complaint that the . . . presentation was 'incomplete' or 'misleading' "). We therefore conclude that § 314(d) bars Cuozzo's efforts to attack the Patent Office's determination to institute inter partes review in this case.

III

Cuozzo further argues that the Patent Office lacked the legal authority to issue its regulation requiring the agency, when conducting an inter partes review, to give a patent claim "its broadest reasonable construction in light of the specification of the patent in which it appears." 37 CFR § 42.100(b). Instead, Cuozzo contends that the Patent Office should, like the courts, give claims their "ordinary meaning . . . as understood by a person of skill in the art." *Phillips*, 415 F. 3d, at 1314.

The statute, however, contains a provision that grants the Patent Office authority to issue "regulations . . . establishing and governing inter partes review under this chapter." 35 U. S. C. § 316(a)(4). The Court of Appeals held that this statute gives the Patent Office the legal authority to issue its broadest reasonable construction regulation. We agree.

A

We interpret Congress' grant of rulemaking authority in light of our decision in *Chevron U. S. A. Inc.*, 467 U. S. 837. Where a statute is clear, the agency must follow the statute. *Id.*, at 842–843. But where a statute leaves a "gap" or is "ambigu[ous]," we typically interpret it as granting the agency leeway to enact rules that are reasonable in light of the text, nature, and purpose of the statute. *Mead Corp.*, 533 U. S., at 229; *Chevron U. S. A. Inc.*, *supra*, at 843. The statute contains such a gap: No statutory provision unambiguously directs the agency to use one standard or the other. And the statute "express[ly] . . . authoriz[es] [the Patent Office] to engage in the process of rulemaking" to address that gap. *Mead Corp.*, *supra*, at 229. Indeed, the statute allows the Patent Office to issue rules "governing inter partes review," § 316(a)(4), and the broadest reasonable construction regulation is a rule that governs inter partes review.

Both the dissenting judges in the Court of Appeals and Cuozzo believe that other ordinary tools of statutory interpretation, *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 432, and n. 12 (1987), lead to a different conclusion. The dissenters, for example, point to cases in which the Circuit interpreted a grant of rulemaking authority in a different statute, § 2(b)(2)(A), as limited to *procedural* rules. See, *e. g.*, *Cooper Technologies Co.* v. *Dudas*, 536 F. 3d 1330, 1335 (CA Fed. 2008). These cases, however, as we just said, interpret a different statute. That statute does not clearly contain the Circuit's claimed limitation, nor is its language the same as that of § 316(a)(4). Section 2(b)(2)(A) grants the Patent Office authority to issue "regulations" "which . . . shall govern . . . *proceedings in the Office*" (emphasis added), but the statute before us, § 316(a)(4), does not refer to "proceedings"—it refers more broadly to regulations "establishing and governing inter partes review." The Circuit's prior interpretation of § 2(b)(2)(A) cannot magically render unambiguous the different language in the different statute before us.

Cuozzo and its supporting *amici* believe we will reach a different conclusion if we carefully examine the purpose of inter partes review. That purpose, in their view, is to modify the previous reexamination procedures and to replace them with a " 'trial, adjudicatory in nature.' " Brief for Petitioner 26 (quoting *Google Inc.* v. *Jongerius Panoramic Techs., LLC*, IPR 2013–00191, Paper No. 50, p. 4 (PTAB, Feb. 13, 2014)). They point out that, under the statute, an opposing party can trigger inter partes review. Parties can engage in "discovery of relevant evidence," including "deposition[s], . . . affidavits or declarations" as well as anything "otherwise necessary in the interest of justice." § 316(a)(5). Parties may present "factual evidence and expert opinions" to support their arguments. § 316(a)(8). The challenger bears the burden of proving unpatentability. § 318(e). And, after oral argument before a panel of three of the Board's administrative patent judges, it issues a final written decision. §§ 6, 316(a)(10), 318. Perhaps most importantly, a decision to cancel a patent normally has the same effect as a district court's determination of a patent's invalidity.

In light of these adjudicatory characteristics, which make these agency proceedings similar to court proceedings, Congress, in Cuozzo's view, must have designed inter partes review as a "surrogate for court proceedings." Brief for Petitioner 28. Cuozzo points to various sources of legislative history in support of its argument. See H. R. Rep., at 48 (Inter partes review is a "quick and cost effective alternativ[e] to litigation"); *id.*, at 46–47 ("The Act converts inter partes reexamination from an examinational to an adjudicative proceeding"); see also S. Rep. No. 110–259, p. 20 (2008) (Inter partes review is "a quick, inexpensive, and reliable alternative to district court litigation"); 157 Cong. Rec. 3429–3430 (2011) (remarks of Sen. Kyl) ("Among the reforms that are expected to expedite these proceedings [is] the shift from an examinational to an adjudicative model"). And, if Congress intended to create a "surrogate" for court proceedings, why would Congress not also have intended the agency to use the claim construction standard that district courts apply (namely, the ordinary meaning standard), rather than the claim construction standard that patent examiners apply (namely, the broadest reasonable construction standard)?

The problem with Cuozzo's argument, however, is that, in other significant respects, inter partes review is less like a judicial proceeding and more like a specialized agency proceeding. Parties that initiate the proceeding need not have a concrete stake in the outcome; indeed, they may lack constitutional standing. See § 311(a); cf. *Consumer Watchdog* v. *Wisconsin Alumni Research Foundation*, 753 F. 3d 1258, 1261–1262 (CA Fed. 2014). As explained above, challengers need not remain in the proceeding; rather, the Patent Office may continue to conduct an inter partes review even after the adverse party has settled. § 317(a). Moreover, as is the case here, the Patent Office may intervene in a later *judicial* proceeding to defend its decision—even if the private challengers drop out. And the burden of proof in inter partes review is different than in the district courts: In inter partes review, the challenger (or the Patent Office) must establish unpatentability "by a preponderance of the evidence"; in district court, a challenger must prove invalidity by "clear and convincing evidence." Compare § 316(e) with *Microsoft Corp.* v. *i4i L. P.*, 564 U. S. 91, 95 (2011).

Most importantly, these features, as well as inter partes review's predecessors, indicate that the purpose of the proceeding is not quite the same as the purpose of district court litigation. The proceeding involves what used to be called a *reexamination* (and, as noted above, a cousin of inter partes review, ex parte reexamination, 35 U. S. C. § 302 *et seq.*, still bears that name). The name and accompanying procedures suggest that the proceeding offers a second look at an earlier administrative grant of a patent. Although Congress changed the name from "reexamination" to "review," nothing convinces us that, in doing so, Congress wanted to change its basic purposes, namely, to reexamine an earlier agency decision. Thus, in addition to helping resolve concrete patent-related disputes among parties, inter partes review helps protect the public's "paramount interest in seeing that patent monopolies . . . are kept within their legitimate scope." *Precision Instrument Mfg. Co.* v. *Automotive Maintenance Machinery Co.*, 324 U. S. 806, 816 (1945); see H. R. Rep., at 39–40 (Inter partes review is an "efficient system for challenging patents that should not have issued").

Finally, neither the statutory language, its purpose, or its history suggest that Congress considered what standard the agency should apply when reviewing a patent claim in inter partes review. Cuozzo contends that § 301(d), explaining that the Patent Office should "determine the proper meaning of a patent claim," reinforces its conclusion that the ordinary meaning standard should apply. But viewed against a background of language and practices indicating that Congress designed a hybrid proceeding, § 301(d)'s reference to the "proper meaning" of a claim is ambiguous. It leaves open the question of which claim construction standard is "proper."

The upshot is, whether we look at statutory language alone, or that language in context of the statute's purpose, we find an express delegation of rulemaking authority, a "gap" that rules might fill, and "ambiguity" in respect to the boundaries of that gap. *Mead Corp.*, 533 U. S., at 229; see *Chevron U. S. A. Inc.*, 467 U. S., at 843. We consequently turn to the question whether the Patent Office's regulation is a reasonable exercise of its rulemaking authority.

B

We conclude that the regulation represents a reasonable exercise of the rulemaking authority that Congress delegated to the Patent Office. For one thing, construing a patent claim according to its broadest reasonable construction helps to protect the public. A reasonable, yet unlawfully broad claim might discourage the use of the invention by a member of the public. Because an examiner's (or reexaminer's) use of the broadest reasonable construction standard increases the possibility that the examiner will find the claim too broad (and deny it), use of that standard encourages the applicant to draft narrowly. This helps ensure precision while avoiding overly broad claims, and thereby helps prevent a patent from tying up too much knowledge, while helping members of the public draw useful information from the disclosed invention and better understand the lawful limits of the claim. See § 112(a); *Nautilus, Inc.* v. *Biosig Instruments, Inc.*, 572 U. S. 898, 909–910 (2014); see also *In re Yamamoto*, 740 F. 2d 1569, 1571 (CA Fed. 1984).

For another, past practice supports the Patent Office's regulation. See 77 Fed. Reg. 48697 (2012). The Patent Office has used this standard for more than 100 years. 793 F. 3d, at 1276. It has applied that standard in proceedings that, as here, resemble district court litigation. See *Bamberger* v. *Cheruvu*, 55 USPQ 2d 1523, 1527 (BPAI 1998) (broadest reasonable construction standard applies in interference proceedings); Brief for Generic Pharmaceutical Association et al. as *Amici Curiae* 7–16 (describing similarities between interference proceedings and adjudicatory aspects of inter partes review); see also *In re Yamamoto*, *supra*, at 1571 (broadest reasonable construction standard applies in reexamination). It also applies that standard in proceedings that may be consolidated with a concurrent inter partes review. See 77 Fed. Reg. 48697–48698.

Cuozzo makes two arguments in response. First, Cuozzo says that there is a critical difference between the Patent Office's initial *examination* of an application to determine if a patent should issue, and this proceeding, in which the agency *reviews* an already-issued patent. In an initial examination of an application for a patent the examiner gives the claim its broadest reasonable construction. But if the patent examiner rejects the claim, then, as described above, Part I–A, *supra*, the applicant has a right to amend and resubmit the claim. And the examiner and applicant may repeat this process at least once more. This system—broad construction with a chance to amend—both protects the public from overly broad claims and gives the applicant a fair chance to draft a precise claim that will qualify for patent protection. In inter partes review, however, the broadest reasonable construction standard may help protect certain public interests, but there is no absolute right to amend any challenged patent claims. This, Cuozzo says, is unfair to the patent holder.

The process however, is not as unfair as Cuozzo suggests. The patent holder may, at least once in the process, make a motion to do just what he would do in the examination process, namely, amend or narrow the claim. § 316(d) (2012 ed.). This opportunity to amend, together with the fact that the original application process may have presented several additional opportunities to amend the patent, means that use of the broadest reasonable construction standard is, as a general matter, not unfair to the patent holder in any obvious way.

Cuozzo adds that, as of June 30, 2015, only 5 out of 86 motions to amend have been granted. Brief for Petitioner 30; see Tr. of Oral Arg. 30 (noting that a sixth motion had been granted by the time of oral argument in this case). But these numbers may reflect the fact that no amendment could save the inventions at issue, *i. e.*, that the patent should have never issued at all.

To the extent Cuozzo's statistical argument takes aim at the manner in which the Patent Office has exercised its authority, that question is not before us. Indeed, in this particular case, the agency determined that Cuozzo's proposed amendment "enlarge[d]," rather than narrowed, the challenged claims. App. to Pet. for Cert. 165a–166a; see § 316(d)(3). Cuozzo does not contend that the decision not to allow its amendment is "arbitrary" or "capricious," or "otherwise [un]lawful." 5 U. S. C. § 706(2)(A).

Second, Cuozzo says that the use of the broadest reasonable construction standard in inter partes review, together with use of an ordinary meaning standard in district court, may produce inconsistent results and cause added confusion. A district court may find a patent claim to be valid, and the agency may later cancel that claim in its own review. We recognize that that is so. This possibility, however, has long been present in our patent system, which provides different tracks—one in the Patent Office and one in the courts—for the review and adjudication of patent claims. As we have explained above, inter partes review imposes a different burden of proof on the challenger. These different evidentiary burdens mean that the possibility of inconsistent results is inherent to Congress' regulatory design. Cf. *One Lot Emerald Cut Stones* v. *United States*, 409 U. S. 232, 235–238 (1972) (*per curiam*).

Moreover, the Patent Office uses the broadest reasonable construction standard in other proceedings, including interference proceedings (described above), which may implicate patents that are later reviewed in district court. The statute gives the Patent Office the power to consolidate these other proceedings with inter partes review. To try to create uniformity of standards would consequently prove difficult. And we cannot find unreasonable the Patent Office's decision to prefer a degree of inconsistency in the standards used between the courts and the agency, rather than among agency proceedings. See 77 Fed. Reg. 48697–48698.

Finally, Cuozzo and its supporting *amici* offer various policy arguments in favor of the ordinary meaning standard. The Patent Office is legally free to accept or reject such policy arguments on the basis of its own reasoned analysis. Having concluded that the Patent Office's regulation, selecting the broadest reasonable construction standard, is reasonable in light of the rationales described above, we do not decide whether there is a better alternative as a policy matter. That is a question that Congress left to the particular expertise of the Patent Office.

* * *

For the reasons set forth above, we affirm the judgment of the Court of Appeals for the Federal Circuit.

It is so ordered.

Appendix to opinion of the Court

APPENDIX

SPEED LIMIT INDICATOR AND METHOD FOR DISPLAYING SPEED AND THE RELEVANT SPEED LIMIT

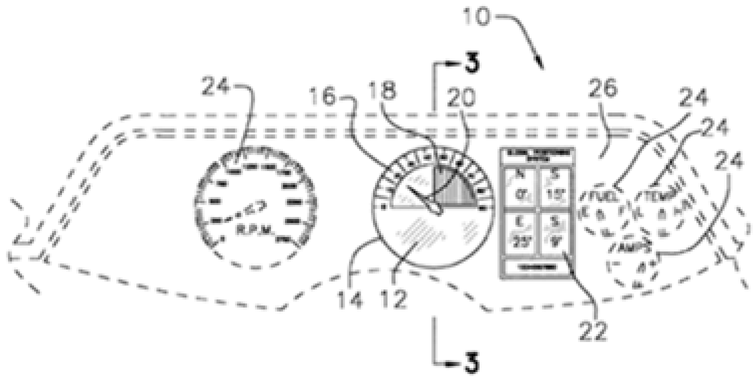

Figure 1

*   *   *

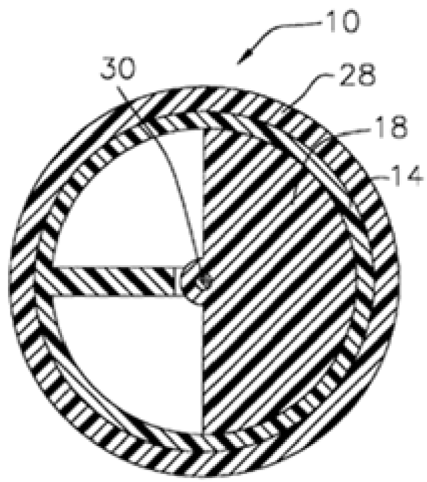

Figure 4

*   *   *

DESCRIPTION OF THE CURRENT EMBODIMENT

"In FIG. **1**, a new and improved speed limit indicator and method for displaying speed and the relevant speed limit **10** . . . is illustrated . . . . More particularly, the speed limit indicator and method for displaying speed and the relevant speed limit **10** has a speedometer **12** mounted on a dashboard **26**. [The] [s]peedometer **12** has a backplate **14** made of plastic, speed denoting markings **16** painted on [that] backplate **14**, a colored display **18** made of a red plastic filter, and a plastic needle **20** rotably mounted in the center of [the] backplate **14**. A [GPS] receiver **22** is positioned adjacent to the speedometer **12**. Other gauges **24** typically present on a dashboard **26** are shown.

. . . . .

"[I]n FIG. **4**, a new and improved speed limit indicator and method for displaying speed and the relevant speed limit **10** . . . is illustrated . . . . More particularly, the speed limit indicator and method for displaying speed and the relevant speed limit **10** has a backplate **14**, colored display **18**, housing **28**, and axle **30**.

. . . . .

"I claim:

. . . . .

"**10**. A speed limit indicator comprising:

"a [GPS] receiver;

"a display controller connected to said [GPS] receiver, wherein said display controller adjusts a colored display in response to signals from said [GPS] receiver to continuously update the delineation of which speed readings are in violation of the speed limit at a vehicle's present location; and

"a speedometer integrally attached to said colored display.

. . . . .

"**14**. The speed limit indicator as defined in claim **10**, wherein said colored display is a colored filter.

. . . . .

"**17**. The speed limit indicator as defined in claim **14**, wherein said display controller rotates said colored filter independently of said speedometer to continuously update the delineation of which speed readings are in violation of the speed limit at a vehicles present location." Cuozzo Patent.

JUSTICE THOMAS, concurring.

The Court invokes *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), and *United States* v. *Mead Corp.*, 533 U. S. 218 (2001), to resolve one of the questions presented in this case. See *ante,* at 266, 276–283. But today's decision does not rest on *Chevron*'s fiction that ambiguity in a statutory term is best construed as an implicit delegation of power to an administrative agency to determine the bounds of the law. In an appropriate case, this Court should reconsider that fiction of *Chevron* and its progeny. See *Michigan* v. *EPA*, 576 U. S. 743, 761 (2015) (THOMAS, J., concurring) ("*Chevron* deference raises serious separation-of-powers questions"); see also *Department of Transportation* v. *Association of American Railroads*, 575 U. S. 43, 70 (2015) (THOMAS, J., concurring in judgment) ("[T]he discretion inherent in executive power does *not* comprehend the discretion to formulate generally applicable rules of private conduct"); *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 119 (2015) (THOMAS, J., concurring in judgment) ("Those who ratified the Constitution knew that legal texts would often contain ambiguities. . . . The judicial power was understood to include the power to resolve these ambiguities over time"); Cass, Is *Chevron*'s Game Worth the Candle? Burning Interpretation at Both Ends, in Liberty's Nemesis 57–69 (D. Reuter & J. Yoo eds. 2016).

The Court avoids those constitutional concerns today because the provision of the America Invents Act at issue contains an express and clear conferral of authority to the Patent Office to promulgate rules governing its own proceedings. See 35 U. S. C. § 316(a)(4); *ante,* at 277. And by asking whether the Patent Office's preferred rule is reasonable, *ante,* at 280–283, the Court effectively asks whether the rulemaking was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in conformity with the Administrative Procedure Act, 5 U. S. C. § 706(2)(A). I therefore join the Court's opinion in full.

JUSTICE ALITO, with whom JUSTICE SOTOMAYOR joins, concurring in part and dissenting in part.

Congress has given the Patent and Trademark Office considerable authority to review and cancel issued patent claims. At the same time, Congress has cabined that power by imposing significant conditions on the Patent Office's institution of patent review proceedings. Unlike the Court, I do not think that Congress intended to shield the Patent Office's compliance—or noncompliance—with these limits from all judicial scrutiny. Rather, consistent with the strong presumption favoring judicial review, Congress required only that judicial review, including of issues bearing on the institution of patent review proceedings, be channeled through an appeal from the agency's final decision. I respectfully dissent from the Court's contrary holding.[1]

I

In the Leahy-Smith America Invents Act (AIA), 35 U. S. C. § 100 *et seq.*, Congress created three new mechanisms for Patent Office review of issued patent claims—inter partes review, post-grant review, and covered business method patent review (CBM review). This case involves the first of these proceedings, inter partes review.

Under inter partes review, anyone may file a petition challenging the patentability of an issued patent claim at almost

[1] I agree with the Court that the Patent Office permissibly applies a "broadest reasonable construction" standard to construe patent claims in inter partes review, and I therefore join Parts I and III of its opinion.

any time. §§ 311(a), (c). The grounds for challenge are limited to the patentability of the claim under § 102 (which requires patent claims to be novel) and § 103 (which requires patent claims to be nonobvious). § 311(b).

The statute imposes other restrictions as well. A petition for inter partes review "may be considered only if" the petition satisfies certain requirements, including (as relevant here) that the petition "identif[y], in writing and with particularity, each claim challenged, the grounds on which the challenge to each claim is based, and the evidence that supports the grounds for the challenge to each claim." § 312(a)(3). Additionally, "inter partes review may not be instituted" if the party challenging the patent previously filed a civil action challenging the patent's validity or was sued for infringing the patent more than a year before seeking inter partes review. §§ 315(a)(1), (b). Finally, the Patent Office may not institute inter partes review "unless the Director [of the Patent Office] determines that the information presented in the [challenger's] petition . . . and any response [by the patent owner] shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition." § 314(a).[2]

The statute provides that "[t]he determination by the Director whether to institute an inter partes review under this section shall be final and nonappealable." § 314(d). If inter partes review is instituted, the Patent Office conducts a trial that culminates in a "final written decision" on the patentability of the challenged claims. § 318(a). Any patent owner or challenger that is "dissatisfied" with that decision may appeal to the Federal Circuit. § 319.

[2] The Director of the Patent Office has delegated his authority to institute inter partes review to the Patent Trial and Appeal Board (Board), which also conducts and decides the inter partes review. See 37 CFR §§ 42.4(a), 42.108 (2015); 35 U. S. C. §§ 316(c), 318(a). I therefore use the term "Patent Office" to refer to the Director, the Board, and the Patent Office generally, as the case may be.

II

In this case, the Patent Office instituted inter partes review of claims 10 and 14 of Cuozzo's patent based on prior art that the challenger's petition did not cite with respect to those claims. After trial, the Patent Office issued a final written decision holding those claims unpatentable, and Cuozzo appealed that decision to the Federal Circuit. In its appeal, Cuozzo argued (among other things) that the Patent Office had violated the requirement that a petition for inter partes review "may be considered only if" the petition identifies "the grounds on which the challenge to each claim is based, and the evidence that supports the grounds for the challenge," "with particularity." § 312(a)(3).

The Federal Circuit held that it could not entertain this argument because § 314(d) provides that the Patent Office's decision to institute an inter partes review is "final and nonappealable." See *In re Cuozzo Speed Technologies, LLC*, 793 F. 3d 1268, 1273 (2015). This Court now affirms.

I disagree. We have long recognized that "Congress rarely intends to prevent courts from enforcing its directives to federal agencies. For that reason, this Court applies a 'strong presumption' favoring judicial review of administrative action." *Mach Mining, LLC* v. *EEOC*, 575 U. S. 480, 486 (2015) (quoting *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 670 (1986)). While the "presumption is rebuttable," "the agency bears a 'heavy burden' in attempting to show that Congress 'prohibit[ed] all judicial review' of the agency's compliance with a legislative mandate." *Mach Mining, supra,* at 486 (quoting *Dunlop* v. *Bachowski*, 421 U. S. 560, 567 (1975)). If a provision can reasonably be read to permit judicial review, it should be.

Our decision in *Lindahl* v. *Office of Personnel Management*, 470 U. S. 768 (1985), illustrates the power of this presumption. The statute at issue there provided that agency " 'decisions . . . concerning [questions of disability and dependency] are final and conclusive and are not subject to review.'" *Id.*, at 771. The Federal Circuit concluded that the statute cut off all judicial review of such decisions, stating that "'[i]t is difficult to conceive of a more clear-cut statement of congressional intent to preclude review than one in which the concept of finality is thrice repeated in a single sentence.'" *Id.*, at 779. We reversed. We acknowledged that the statute "plausibly c[ould] be read as imposing an absolute bar to judicial review," but we concluded that "it also quite naturally c[ould] be read as precluding review only of . . . *factual* determinations" underlying the agency's decision, while permitting review of legal questions. *Ibid.* In light of the presumption of reviewability, we adopted the latter reading. We observed that "when Congress intends to bar judicial review altogether, it typically employs language far more unambiguous and comprehensive," giving as an example a statute that made an agency decision "'final and conclusive for all purposes and with respect to all questions of law or fact'" and "'not subject to review by another official of the United States or by a court by mandamus or otherwise.'" *Id.*, at 779–780, and n. 13.[3]

This is a far easier case than *Lindahl*. There is no question that the statute now before us can naturally—perhaps most naturally—be read to permit judicial review of issues bearing on the Patent Office's institution of inter partes review. Section 314(d) reads: "The determination by the Director whether to institute an inter partes review under this section shall be final and nonappealable." Unlike the stat-

[3] The Court tries to recast *Lindahl* as a decision about "agenc[y] primacy" by focusing on its recognition that factual questions were unreviewable under the relevant statute (no one disputed that) and treating the case's holding that legal questions *were* reviewable as an afterthought. *Ante*, at 274. The review that *Lindahl* permitted—to correct "a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart of the administrative determination," 470 U. S., at 791 (internal quotation marks omitted)—is quite similar to the review I envision of Patent Office decisions to institute inter partes review, as the discussion that follows makes clear.

utes we addressed in *Lindahl* (including the one we found to permit review), § 314(d) does not say that an institution decision is "not subject to review." Instead, it makes the institution decision "nonappealable." This is fairly interpreted to bar only an *appeal* from the institution decision itself, while allowing *review* of institution-related issues in an appeal from the Patent Office's final written decision at the end of the proceeding. See § 319. Our cases have used the term "nonappealable" in just this way—to refer to matters that are not *immediately* or *independently* appealable, but which are subject to review at a later point.[4] Thus, while the decision to institute inter partes review is "final and nonappealable" in the sense that a court cannot stop the proceeding from going forward,[5] the question whether it was lawful to institute review will not escape judicial scrutiny. This approach is consistent with the normal rule that a party may challenge earlier agency rulings that are themselves "not directly reviewable" when seeking review of a final, appealable decision. 5 U. S. C. § 704. And it strikes a sensible balance: The Patent Office may proceed unimpeded with the inter partes review process (which must normally be completed within one year, see 35 U. S. C. § 316(a)(11)), but it will be held to account for its compliance with the law at the end of the day.

In rejecting this commonsense interpretation, the Court gives short shrift to the presumption in favor of judicial review. Its primary reason for disregarding the presumption

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[4] See *Mohawk Industries, Inc.* v. *Carpenter*, 558 U. S. 100, 105, n. 1, 109 (2009) (agreeing with decisions holding that attorney-client privilege rulings are "nonappealable" because "postjudgment appeals generally suffice to protect the rights of litigants"); *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 469, 472, n. 17 (1978) (describing an order denying class certification as "nonappealable" but noting that it "is subject to effective review after final judgment").

[5] Like the Court, I do not have occasion to address whether in extraordinary cases a patent owner might seek mandamus to stop an inter partes review before the proceeding concludes.

reduces to an assertion—devoid of any textual analysis—that *surely* § 314(d) must bar review of legal questions related to institution decisions. *Ante,* at 271–272. As I have explained, the statute's text does not require that conclusion.

Moving (further) away from the statutory text, the Court next objects that allowing judicial review "would undercut one important congressional objective, namely, giving the Patent Office significant power to revisit and revise earlier patent grants." *Ante,* at 272. I am not sure that the Court appreciates how remarkable this assertion is. It would give us cause to do away with judicial review whenever we think that review makes it harder for an agency to carry out important work. In any event, the majority's logic is flawed. Judicial review enforces the limits that *Congress* has imposed on the agency's power. It thus serves to buttress, not "undercut," Congress's objectives. By asserting otherwise, the majority loses sight of the principle that "no legislation pursues its purposes at all costs." *Rodriguez* v. *United States*, 480 U. S. 522, 525–526 (1987) (*per curiam*). "Every statute purposes, not only to achieve certain ends, but also to achieve them by particular means—and there is often a considerable legislative battle over what those means ought to be. The withholding of agency authority is as significant as the granting of it, and we have no right to play favorites between the two." *Director, Office of Workers' Compensation Programs* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U. S. 122, 136 (1995). The inter partes review statute is no exception. It empowers the Patent Office to clean up bad patents, but it expressly forbids the Patent Office to institute inter partes review—or even consider petitions for inter partes review—unless certain conditions are satisfied. Nothing in the statute suggests that Congress wanted to improve patent quality at the cost of fidelity to the law.

The Court also observes that the inter partes review appeal provision, § 319, "limit[s] appellate review to the 'final written decision.' " *Ante*, at 272. The majority reads too much into this provision. Section 319 provides simply that "[a] party dissatisfied with the final written decision . . . may appeal the decision." The statute does not restrict the issues that may be raised in such an appeal. As the Patent Office once explained (before having a change of heart), the "plain language of the statutory text" recognizes a "right of judicial review . . . for any party 'dissatisfied' by the [Patent Office's] ultimate 'written [decision],' " and "[n]othing in the statutory scheme limits the reasons that a party might be so 'dissatisfied.' " Memorandum of Law in Support of Defendant's Motion To Dismiss in *Versata Development Group, Inc.* v. *Rea*, Civ. Action No. 1:13cv328 (ED Va., May 16, 2013), p. 16. A party may be dissatisfied with a final written decision in an inter partes review because the Patent Office lacked authority to institute the proceeding in the first place, or because the Office committed some other error in the lead-up to its final decision. Neither § 314(d) nor § 319 prevents a party from pressing such issues on an appeal from the final decision. This is familiar practice under 28 U. S. C. § 1291, which similarly limits appeals to "final decisions of the district courts" but allows appellants to challenge earlier rulings as part of those appeals. See *Quackenbush* v. *Allstate Ins. Co.*, 517 U. S. 706, 712 (1996) ("The general rule is that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage in the litigation may be ventilated" (internal quotation marks omitted)); 15A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3905.1, pp. 250, 252 (2d ed. 1992) (noting "the general rule that appeal from final judgment . . . permits review of all rulings that led up to the judgment" and observing that "[t]he variety of orders open to review on subsequent appeal from a final judgment is enormous"). And, as noted above, judicial review of "final agency action" likewise encompasses earlier rulings that are "not directly reviewable." 5 U. S. C. § 704; see *supra*, at 291.

The Court next contends that my interpretation renders 35 U. S. C. § 314(d) "superfluous." *Ante*, at 273. Reading the statute to defer review of institution decisions is "unnecessary," the Court says, because the "Administrative Procedure Act already limits review to final agency decisions" and a "decision to initiate inter partes review is 'preliminary,' not 'final.'" *Ibid.* But Congress reasonably may have thought that the matter needed clarifying, given that § 314(d) itself calls such a decision "final" (albeit in a different sense, see *supra*, at 291). Language is not superfluous when it "remove[s] any doubt" about a point that might otherwise be unclear. *Ali* v. *Federal Bureau of Prisons*, 552 U. S. 214, 226 (2008). More important, my reading prevents an appeal from a decision *not* to institute inter partes review, which is plainly final agency action and so—absent § 314(d)—might otherwise trigger immediate review. The Court asserts that this too is unnecessary because, in its view, a decision to deny inter partes review is "committed to agency discretion by law" and so unreviewable under normal principles of administrative law. 5 U. S. C. § 701(a)(2); see *ante*, at 273. I agree that one can infer from the statutory scheme that the Patent Office has discretion to deny inter partes review even if a challenger satisfies the threshold requirements for review. But the law does not say so directly and Congress may not have thought the point self-evident. Again, 35 U. S. C. § 314(d) plays a clarifying role. This gives the provision plenty of work to do. There is no need to read it more broadly.[6]

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[6] It is true that my interpretation leaves no apparent avenue (short of mandamus, at least) for judicial review of decisions *not* to institute inter partes review. This demonstrates that the presumption of reviewability has its limits. Nor is it surprising that Congress would design such a scheme. A patent challenger does not have nearly as much to lose from an erroneous *denial* of inter partes review as a patent owner stands to

III

A

None of this is to say that courts must—or should—throw out an inter partes review decision whenever there is some technical deficiency in the challenger's petition or in the Patent Office's institution decision. Although § 314(d) does not preclude review of issues bearing on institution, normal limits on judicial review still apply. For example, errors that do not cause a patent owner prejudice may not warrant relief. See 5 U. S. C. § 706 ("[D]ue account shall be taken of the rule of prejudicial error"). Some errors may also be superseded by later developments. Most notably, once the Patent Office issues its final written decision, the probabilistic question whether a challenger is "reasonabl[y] likel[y]" to prevail on the merits, 35 U. S. C. § 314(a), will be subsumed by the ultimate question whether the challenger *should in fact* prevail.[7] And while I have no occasion here to decide the matter, it may be that courts owe some degree of deference to the Patent Office's application of the statutory prerequisites to inter partes review.

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lose from an erroneous *grant* of inter partes review. Although such a challenger loses some of the advantages of inter partes review (such as a more favorable claim construction standard and a lower burden of proof), it remains free to challenge the patent's validity in litigation. A patent owner, on the other hand, risks the destruction of a valuable property right.

[7] The Court recognizes that such issues are unreviewable even absent a statute like § 314(d), comparing the Patent Office's "reasonable likelihood" determination to an indicting grand jury's finding of probable cause. See *ante*, at 273. But it draws the wrong analogy for this case. Cuozzo's complaint is that the petition for inter partes review did not articulate its challenge to certain patent claims with adequate particularity. This is more akin to an argument that an indictment did not sufficiently allege an offense and provide notice of the charges against the defendant, which is reviewable after trial and judgment. See, *e. g., United States* v. *Carll*, 105 U. S. 611, 612–613 (1882) (overturning a conviction based on the insufficiency of the indictment).

I would leave these considerations for the Court of Appeals to address in the first instance. But I must confess doubts that Cuozzo could ultimately prevail. As noted above, Cuozzo argues that the Patent Office improperly granted inter partes review of claims 10 and 14 on grounds not asserted in the petition for inter partes review, in violation of the statutory requirement that a petition must state the grounds for challenge "with particularity." § 312(a)(3). The problem for Cuozzo is that claim 17—which the petition properly challenged—incorporates all of the elements of claims 10 and 14. Accordingly, an assertion that claim 17 is unpatentable in light of certain prior art is necessarily an assertion that claims 10 and 14 are unpatentable as well. Assuming that Cuozzo must show prejudice from the error it alleges, it is hard to see how Cuozzo could do so here.

B

But any perceived weakness in the merits of Cuozzo's appeal does not mean that such issues are unworthy of judicial review. Section 312(a)(3)'s particularity requirement is designed, at least in part, to ensure that a patent owner has sufficient notice of the challenge against which it must defend. Once inter partes review is instituted, the patent owner's response—its opening brief, essentially—is filed as an opposition to the challenger's petition. See § 316(a)(8); 37 CFR § 42.120. Thus, if a petition fails to state its challenge with particularity—or if the Patent Office institutes review on claims or grounds not raised in the petition—the patent owner is forced to shoot into the dark. The potential for unfairness is obvious.

Other problems arise if the Patent Office fails to enforce the prohibitions against instituting inter partes review at the behest of challengers that have already sued to invalidate the patent or that were sued for infringement more than a year before seeking inter partes review. 35 U. S. C.

§§ 315(a)(1), (b). Allowing such a challenge exposes the patent owner to the burden of multiplicative proceedings—including discovery in both forums, see § 316(a)(5)—while permitting the challenger to exploit inter partes review's lower standard of proof and more favorable claim construction standard. Congress understandably thought that the Patent Office's power should not be wielded in this way. Yet, according to the Court, Congress made courts powerless to correct such abuses.

Even more striking are the consequences that today's decision portends for the AIA's other patent review mechanisms, post-grant review and CBM review, see *supra*, at 287, which are subject to a "no appeal" provision virtually identical to § 314(d). See § 324(e) ("The determination by the Director whether to institute a post-grant review under this section shall be final and nonappealable"); see AIA § 18(a)(1), 125 Stat. 329, note following 35 U. S. C. § 321, p. 1442 (CBM review generally "shall be regarded as, and shall employ the standards and procedures of, a post-grant review"). Post-grant review and CBM review allow for much broader review than inter partes review. While inter partes review is limited to assessing patentability under § 102 and § 103, in post-grant review and CBM review, patent claims can also be scrutinized (and canceled) on any invalidity ground that may be raised as a defense to infringement, including such grounds as ineligible subject matter under § 101, indefiniteness under § 112, and improper enlargement of reissued claims under § 251. See § 321(b); §§ 282(b)(2), (3). But this broader review comes with its own strict limits. A petition for post-grant review must be filed within nine months after a patent is granted. § 321(c). And while CBM review is not subject to this time limit, Congress imposed a subject-matter restriction: The Patent Office "may institute a [CBM review] proceeding only for a patent that is a covered business method patent," which Congress defined to cover certain patents with claims relating to "a financial product or service." AIA §§ 18(a)(1)(E), (d)(1), at 1442; see § 18(a)(1)(A), *ibid.*[8]

Congress thus crafted a three-tiered framework for Patent Office review of issued patents: broad post-grant review in a patent's infancy, followed by narrower inter partes review thereafter, with a limited exception for broad review of older covered business method patents. Today's decision threatens to undermine that carefully designed scheme. Suppose that the Patent Office instituted post-grant review on a petition filed 12 months (or even 12 years) after a patent was issued, and then invalidated a patent claim as indefinite under § 112—a ground available in post-grant review but not in inter partes review. This would grossly exceed the Patent Office's authority and would be manifestly prejudicial to the patent owner. Can Congress really have intended to shield such shenanigans from judicial scrutiny? The Court answers with a non sequitur: Of course the Patent Office cannot cancel a patent under § 112 "in inter partes review." *Ante*, at 275. The Court seems to think that we could overturn the Patent Office's decision to institute "post-grant review" based on an untimely petition and declare that the agency has *really* instituted only "inter partes review." But how is that possible under today's opinion? After all, the petition's timeliness, no less than the particularity of its allegations, is "closely tied to the application and interpretation of statutes related to the Patent Office's decision to initiate . . . review," and the Court says that such questions are unreviewable. *Ibid.*; see § 321(c); § 312(a)(3).

To take things a step further, suppose that the Patent Office purported to forgive the post-grant review petition's tardiness by declaring the challenged patent a "covered business method patent," even though the patent has nothing to

[8] Additionally, a challenger may file a petition for CBM review only if it has been sued for or charged with infringement of the patent. AIA § 18(a)(1)(B), at 1442.

do with financial products or services (it claims, say, a new kind of tempered glass). Again, this involves the application of statutes related to the Patent Office's institution decision. See AIA § 18(a)(1)(E), at 1442 (Patent Office "may institute a [CBM review] proceeding only for a patent that is a covered business method patent"). So is this specious determination immune from judicial scrutiny under the Court's reasoning?

If judicial review of these issues is unavailable, then nothing would prevent the Patent Office from effectively collapsing Congress's three-tiered review structure and subjecting all patents to broad post-grant review at all times. Congress cannot have intended that.

I take the Court at its word that today's opinion will not permit the Patent Office "to act outside its statutory limits" in these ways. *Ante,* at 275. But how to get there from the Court's reasoning—and how to determine which "statutory limits" we should enforce and which we should not—remains a mystery. I would avoid the suspense and hold that 35 U. S. C. § 314(d) does not bar judicial review of the Patent Office's compliance with any of the limits Congress imposed on the institution of patent review proceedings. That includes the statutory limit, § 312(a)(3), that Cuozzo alleges was violated here.

* * *

In enacting the AIA, Congress entrusted the Patent Office with a leading role in combating the detrimental effect that bad patents can have on innovation. But Congress did not give the agency unbridled authority. The principles I have set forth afford the Patent Office plenty of latitude to carry out its charge, while ensuring that the Office's actions—no less than the patents it reviews—stay within the bounds of the law.

I would vacate the Federal Circuit's judgment and remand for that court to consider whether the Patent Office exceeded its authority to institute inter partes review with respect to claims 10 and 14 of Cuozzo's patent. With respect to claim 17, I agree with the Court that the judgment below must be affirmed. See n. 1, *supra*; Part III, *ante*.

TAYLOR *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 14–6166. Argued February 23, 2016—Decided June 20, 2016

Petitioner Taylor was indicted under the Hobbs Act on two counts of affecting commerce or attempting to do so through robbery for his participation in two home invasions targeting marijuana dealers. In both cases, Taylor and other gang members broke into the homes, confronted the residents, demanded the location of drugs and money, found neither, and left relatively emptyhanded.

Taylor's trial resulted in a hung jury. At his retrial, the Government urged the trial court to preclude Taylor from offering evidence that the drug dealers he targeted dealt only in locally grown marijuana. The trial court excluded that evidence and Taylor was convicted on both counts. The Fourth Circuit affirmed, holding that, given the aggregate effect of drug dealing on interstate commerce, the Government needed only to prove that Taylor robbed or attempted to rob a drug dealer of drugs or drug proceeds to satisfy the commerce element.

Held:

1. The prosecution in a Hobbs Act robbery case satisfies the Act's commerce element if it shows that the defendant robbed or attempted to rob a drug dealer of drugs or drug proceeds. Pp. 305–309.

(a) The language of the Hobbs Act is unmistakably broad and reaches any obstruction, delay, or other effect on commerce, 18 U. S. C. § 1951(a), "over which the United States has jurisdiction," § 1951(b)(3). See *United States* v. *Culbert*, 435 U. S. 371, 373. Pp. 305–306.

(b) Under its commerce power, this Court has held, Congress may regulate, among other things, activities that have a substantial aggregate effect on interstate commerce, see *Wickard* v. *Filburn*, 317 U. S. 111, 125. This includes "purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce," *Gonzales* v. *Raich*, 545 U. S. 1, 17, so long as those activities are economic in nature. See *United States* v. *Morrison*, 529 U. S. 598, 613. One such "class of activities" is the production, possession, and distribution of controlled substances. 545 U. S., at 22. Grafting the holding in *Raich* onto the Hobbs Act's commerce element, it follows that a robber who affects even the intrastate sale of marijuana affects commerce over which the United States has jurisdiction. Pp. 306–307.

(c) In arguing that *Raich* should be distinguished because the Controlled Substances Act lacks the Hobbs Act's additional commerce element, Taylor confuses the standard of proof with the meaning of the element that must be proved. The meaning of the Hobbs Act's commerce element is a question of law, which, *Raich* establishes, includes purely intrastate drug production and sale. Applying, without expanding, *Raich*'s interpretation of the scope of Congress's Commerce Clause power, if the Government proves beyond a reasonable doubt that a robber targeted a marijuana dealer's drugs or illegal proceeds, the Government has proved beyond a reasonable doubt that commerce over which the United States has jurisdiction was affected. Pp. 307–310.

2. Here, the Government met its burden by introducing evidence that Taylor's gang intentionally targeted drug dealers to obtain drugs and drug proceeds. That evidence included information that the gang members targeted the victims because of their drug dealing activities, as well as explicit statements made during the course of the robberies that revealed their belief that drugs and money were present. Such proof is sufficient to meet the Hobbs Act's commerce element. P. 310.

754 F. 3d 217, affirmed.

Alito, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Thomas, J., filed a dissenting opinion, *post*, p. 310.

Dennis E. Jones argued the cause for petitioner. With him on the briefs was *Seth C. Weston.*

Anthony A. Yang argued the cause for the United States. With him on the brief were *Solicitor General Verrilli, Assistant Attorney General Caldwell,* and *Deputy Solicitor General Dreeben.*

Justice Alito delivered the opinion of the Court.

The Hobbs Act makes it a crime for a person to affect commerce, or to attempt to do so, by robbery. 18 U. S. C. § 1951(a). The Act defines "commerce" broadly as interstate commerce "and all other commerce over which the United States has jurisdiction." § 1951(b)(3). This case requires us to decide what the Government must prove to satisfy the Hobbs Act's commerce element when a defendant commits a robbery that targets a marijuana dealer's drugs or drug proceeds.

The answer to this question is straightforward and dictated by our precedent. We held in *Gonzales* v. *Raich*, 545 U. S. 1 (2005), that the Commerce Clause gives Congress authority to regulate the national market for marijuana, including the authority to proscribe the purely intrastate production, possession, and sale of this controlled substance. Because Congress may regulate these intrastate activities based on their aggregate effect on interstate commerce, it follows that Congress may also regulate intrastate drug *theft*. And since the Hobbs Act criminalizes robberies and attempted robberies that affect any commerce "over which the United States has jurisdiction," § 1951(b)(3), the prosecution in a Hobbs Act robbery case satisfies the Act's commerce element if it shows that the defendant robbed or attempted to rob a drug dealer of drugs or drug proceeds. By targeting a drug dealer in this way, a robber necessarily affects or attempts to affect commerce over which the United States has jurisdiction.

In this case, petitioner Anthony Taylor was convicted on two Hobbs Act counts based on proof that he attempted to rob marijuana dealers of their drugs and drug money. We hold that this evidence was sufficient to satisfy the Act's commerce element.

I

Beginning as early as 2009, an outlaw gang called the "Southwest Goonz" committed a series of home invasion robberies targeting drug dealers in the area of Roanoke, Virginia. 754 F. 3d 217, 220 (CA4 2014). For obvious reasons, drug dealers are more likely than ordinary citizens to keep large quantities of cash and illegal drugs in their homes and are less likely to report robberies to the police. For participating in two such home invasions, Taylor was convicted of two counts of Hobbs Act robbery, in violation of § 1951(a), and one count of using a firearm in furtherance of a crime of violence, in violation of § 924(c).

The first attempted drug robbery for which Taylor was convicted occurred in August 2009. *Id.*, at 220. Taylor and others targeted the home of Josh Whorley, having obtained information that Whorley dealt "exotic and high grade" marijuana. *Ibid.* "The robbers expected to find both drugs and money" in Whorley's home. *Ibid.* Taylor and the others broke into the home, searched it, and assaulted Whorley and his girlfriend. They demanded to be told the location of money and drugs but, not locating any, left with only jewelry, $40, two cell phones, and a marijuana cigarette. *Ibid.*

The second attempted drug robbery occurred two months later in October 2009 at the home of William Lynch. *Ibid.* A source informed the leader of the gang that, on a prior occasion, the source had robbed Lynch of 20 pounds of marijuana in front of Lynch's home. The gang also received information that Lynch continued to deal drugs. Taylor and others broke into Lynch's home, held his wife and young children at gunpoint, assaulted his wife, and demanded to know the location of his drugs and money. Again largely unsuccessful, the robbers made off with only a cell phone. *Id.*, at 221.

For his participation in these two home invasions, Taylor was indicted under the Hobbs Act on two counts of affecting commerce or attempting to do so through robbery. App. 11a–13a. His first trial resulted in a hung jury. On retrial, at the urging of the Government, the District Court precluded Taylor from introducing evidence that the drug dealers he targeted might be dealing in only locally grown marijuana. *Id.*, at 60a; see 754 F. 3d, at 221. During the second trial, Taylor twice moved for a judgment of acquittal on the ground that the prosecution had failed to meet its burden on the commerce element, Tr. 445–447, 532–533; see 754 F. 3d, at 221, but the District Court denied those motions, holding that the proof that Taylor attempted to rob drug dealers was sufficient as a matter of law to satisfy that element. Tr. 446, 532–533. The jury found Taylor guilty on both of the Hobbs Act counts and one of the firearms counts. App. 67a–69a.

On appeal, Taylor challenged the sufficiency of the evidence to prove the commerce element of the Hobbs Act, but the Fourth Circuit affirmed. "Because drug dealing in the aggregate necessarily affects interstate commerce," the court reasoned, "the government was simply required to prove that Taylor depleted or attempted to deplete the assets of such an operation." 754 F. 3d, at 224.

We granted certiorari to resolve a conflict in the Circuits regarding the demands of the Hobbs Act's commerce element in cases involving the theft of drugs and drug proceeds from drug dealers. 576 U. S. 1095 (2015).

II

A

The Hobbs Act provides in relevant part as follows:

> "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery . . . or attempts or conspires so to do . . . shall be fined under this title or imprisoned not more than twenty years, or both." 18 U. S. C. § 1951(a).

The Act then defines the term "commerce" to mean

> "commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction." § 1951(b)(3).

The language of the Hobbs Act is unmistakably broad. It reaches any obstruction, delay, or other effect on commerce, even if small, and the Act's definition of commerce encompasses "all . . . commerce over which the United States has jurisdiction." *Ibid.* We have noted the sweep of the Act in past cases. *United States* v. *Culbert*, 435 U. S. 371, 373 (1978) ("These words do not lend themselves to restrictive interpretation"); *Stirone* v. *United States*, 361 U. S. 212, 215 (1960) (The Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence").

B

To determine how far this commerce element extends—and what the Government must prove to meet it—we look to our Commerce Clause cases. We have said that there are three categories of activity that Congress may regulate under its commerce power: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities having a substantial relation to interstate commerce, . . . *i. e.*, those activities that substantially affect interstate commerce." *United States* v. *Lopez*, 514 U. S. 549, 558–559 (1995). We have held that activities in this third category—those that "substantially affect" commerce—may be regulated so long as they substantially affect interstate commerce in the aggregate, even if their individual impact on interstate commerce is minimal. See *Wickard* v. *Filburn*, 317 U. S. 111, 125 (1942) ("[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce").

While this final category is broad, "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *United States* v. *Morrison*, 529 U. S. 598, 613 (2000).

In this case, the activity at issue, the sale of marijuana, is unquestionably an economic activity. It is, to be sure, a form of business that is illegal under federal law and the laws of most States. But there can be no question that marijuana trafficking is a moneymaking endeavor—and a potentially lucrative one at that.

In *Raich*, the Court addressed Congress's authority to regulate the marijuana market. The Court reaffirmed "Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." 545 U. S., at 17. The production, possession, and distribution of controlled substances constitute a "class of activities" that in the aggregate substantially affect interstate commerce, and therefore, the Court held, Congress possesses the authority to regulate (and to criminalize) the production, possession, and distribution of controlled substances even when those activities occur entirely within the boundaries of a single State. Any other outcome, we warned, would leave a gaping enforcement hole in Congress's regulatory scheme. *Id.*, at 22.

The case now before us requires no more than that we graft our holding in *Raich* onto the commerce element of the Hobbs Act. The Hobbs Act criminalizes robberies affecting "commerce over which the United States has jurisdiction." § 1951(b)(3). Under *Raich*, the market for marijuana, including its intrastate aspects, is "commerce over which the United States has jurisdiction." It therefore follows as a simple matter of logic that a robber who affects or attempts to affect even the intrastate sale of marijuana grown within the State affects or attempts to affect commerce over which the United States has jurisdiction.

C

Rejecting this logic, Taylor takes the position that the robbery or attempted robbery of a drug dealer's inventory violates the Hobbs Act only if the Government proves something more. This argument rests in part on the fact that *Raich* concerned the Controlled Substances Act (CSA), the criminal provisions of which lack a jurisdictional element. See 21 U. S. C. §§ 841(a), 844. The Hobbs Act, by contrast, contains such an element—namely, the conduct criminalized must affect or attempt to affect commerce in some way or degree. See 18 U. S. C. § 1951(a). Therefore, Taylor reasons, the prosecution must prove beyond a reasonable doubt either (1) that the particular drugs in question originated or were destined for sale out of State or (2) that the particular drug dealer targeted in the robbery operated an interstate business. See Brief for Petitioner 25–27; Reply Brief 8. The Second and Seventh Circuits have adopted this same argument. See *United States* v. *Needham*, 604 F. 3d 673, 681 (CA2 2010); *United States* v. *Peterson*, 236 F. 3d 848, 855 (CA7 2001).

This argument is flawed. It confuses the standard of proof with the meaning of the element that must be proved. There is no question that the Government in a Hobbs Act prosecution must prove beyond a reasonable doubt that the defendant engaged in conduct that satisfies the Act's commerce element, but the meaning of that element is a question of law. And, as noted, *Raich* established that the purely intrastate production and sale of marijuana is commerce over which the Federal Government has jurisdiction. Therefore, if the Government proves beyond a reasonable doubt that a robber targeted a marijuana dealer's drugs or illegal proceeds, the Government has proved beyond a reasonable doubt that commerce over which the United States has jurisdiction was affected.

The only way to escape that conclusion would be to hold that the Hobbs Act does not exercise the full measure of Congress's commerce power. But we reached the opposite conclusion more than 50 years ago, see *Stirone*, 361 U. S., at 215, and it is not easy to see how the expansive language of the Act could be interpreted in any other way.

This conclusion does not make the commerce provision of the Hobbs Act superfluous. That statute, unlike the criminal provisions of the CSA, applies to forms of conduct that, even in the aggregate, may not substantially affect commerce. The Act's commerce element ensures that applications of the Act do not exceed Congress's authority. But in a case like this one, where the target of a robbery is a drug dealer, proof that the defendant's conduct in and of itself affected or threatened commerce is not needed. All that is needed is proof that the defendant's conduct fell within a category of conduct that, in the aggregate, had the requisite effect.

D

Contrary to the dissent, see *post,* at 319–321 (opinion of Thomas, J.), today's holding merely applies—it in no way expands—*Raich*'s interpretation of the scope of Congress's power under the Commerce Clause. The dissent resists the substantial-effects approach and the aggregation principle on which *Raich* is based, see *post*, at 320–321. But we have not been asked to reconsider *Raich*. So our decision in *Raich* controls the outcome here. As long as Congress may regulate the purely intrastate possession and sale of illegal drugs, Congress may criminalize the theft or attempted theft of those same drugs.

We reiterate what this means. In order to obtain a conviction under the Hobbs Act for the robbery or attempted robbery of a drug dealer, the Government need not show that the drugs that a defendant stole or attempted to steal either traveled or were destined for transport across state lines. Rather, to satisfy the Act's commerce element, it is enough that a defendant knowingly stole or attempted to steal drugs or drug proceeds, for, as a matter of law, the market for illegal drugs is "commerce over which the United States has jurisdiction." And it makes no difference under our cases that any actual or threatened effect on commerce in a particular case is minimal. See *Perez* v. *United States*, 402 U. S. 146, 154 (1971) ("Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class" (emphasis deleted)).

E

In the present case, the Government met its burden by introducing evidence that Taylor's gang intentionally targeted drug dealers to obtain drugs and drug proceeds. One of the victims had been robbed of substantial quantities of drugs at his residence in the past, and the other was thought to possess high-grade marijuana. The robbers also made explicit statements in the course of the robberies revealing that they believed that the victims possessed drugs and drug proceeds. Tr. 359 (asking Lynch "where the weed at"); *id.*, at 93 (asking Whorley "where the money was at, where the weed was at"); *id.*, at 212–213 (asking Whorley, "Where is your money and where is your weed at?"). Both robberies were committed with the express intent to obtain illegal drugs and the proceeds from the sale of illegal drugs. Such proof is sufficient to meet the commerce element of the Hobbs Act.

Our holding today is limited to cases in which the defendant targets drug dealers for the purpose of stealing drugs or drug proceeds. We do not resolve what the Government must prove to establish Hobbs Act robbery where some other type of business or victim is targeted. See, *e. g., Stirone*, *supra*, at 215 (Government offered evidence that the defendant attempted to extort a concrete business that actually obtained supplies and materials from out of State).

* * *

The judgment of the Fourth Circuit is affirmed.

It is so ordered.

JUSTICE THOMAS, dissenting.

The Hobbs Act makes it a federal crime to commit a robbery that "affects" "commerce over which the United States has jurisdiction." 18 U. S. C. §§ 1951(a), (b)(3). Under the Court's decision today, the Government can obtain a Hobbs

Act conviction without proving that the defendant's robbery in fact affected interstate commerce—or any commerce. See *ante*, at 306–310. The Court's holding creates serious constitutional problems and extends our already expansive, flawed commerce-power precedents. I would construe the Hobbs Act in accordance with constitutional limits and hold that the Act punishes a robbery only when the Government proves that the robbery itself affected interstate commerce.

I

In making it a federal crime to commit a robbery that "affects commerce," § 1951(a), the Hobbs Act invokes the full reach of Congress' commerce power: The Act defines "commerce" to embrace "all . . . commerce over which the United States has jurisdiction." § 1951(b)(3). To determine the Hobbs Act's reach, I start by examining the limitations on Congress' authority to punish robbery under its commerce power. In light of those limitations and in accordance with the Hobbs Act's text, I would hold that the Government in a Hobbs Act case may obtain a conviction for robbery only if it proves, beyond a reasonable doubt, that the defendant's robbery itself affected interstate commerce. The Government may not obtain a conviction by proving only that the defendant's robbery affected intrastate commerce or other intrastate activity.

A

Congress possesses only limited authority to prohibit and punish robbery. "The Constitution creates a Federal Government of enumerated powers." *United States* v. *Lopez*, 514 U. S. 549, 552 (1995); see Art. I, § 8; *Marbury* v. *Madison*, 1 Cranch 137, 176 (1803) (Marshall, C. J.) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written"). As with its powers generally, Congress has only limited authority over crime. The Government possesses broad general authority in Territories and federal enclaves. See Art. I, § 8, cl. 17 (conferring power of "exclusive Legislation" over the District of Columbia); Art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"). But its power over crimes committed in the States is very different. The Constitution expressly delegates to Congress authority over only four specific crimes: counterfeiting securities and coin of the United States, Art. I, § 8, cl. 6; piracies and felonies committed on the high seas, Art. I, § 8, cl. 10; offenses against the law of nations, *ibid.*; and treason, Art. III, § 3, cl. 2. Given these limited grants of federal power, it is "clea[r] that Congress cannot punish felonies generally." *Cohens* v. *Virginia*, 6 Wheat. 264, 428 (1821) (Marshall, C. J.). Congress has "no general right to punish murder committed within any of the States," for example, and no general right to punish the many crimes that fall outside of Congress' express grants of criminal authority. *Id.*, at 426. "The Constitution," in short, "withhold[s] from Congress a plenary police power." *Lopez, supra,* at 566; see Art. I, § 8; Amdt. 10.

Beyond the four express grants of federal criminal authority, then, Congress may validly enact criminal laws only to the extent that doing so is "necessary and proper for carrying into Execution" its enumerated powers or other powers that the Constitution vests in the Federal Government. Art. I, § 8, cl. 18. As Chief Justice Marshall explained, "the [federal] government may, legitimately, punish any violation of its laws" as a necessary and proper means for carrying into execution Congress' enumerated powers. *McCulloch* v. *Maryland*, 4 Wheat. 316, 416 (1819); see *id.*, at 416–421. But if these limitations are not respected, Congress will accumulate the general police power that the Constitution withholds.

The scope of Congress' power to punish robbery in the Hobbs Act—or in any federal statute—must be assessed in light of these principles. The Commerce Clause—the constitutional provision that the Hobbs Act most clearly invokes—does not authorize Congress to punish robbery. That Clause authorizes Congress to regulate "Commerce . . . among the several States." Art. I, § 8, cl. 3. Robbery is not "Commerce" under that Clause. At the founding, "commerce" "consisted of selling, buying, and bartering, as well as transporting for these purposes." *Lopez*, *supra*, at 585 (THOMAS, J., concurring). The Commerce Clause, as originally understood, thus "empowers Congress to regulate the buying and selling of goods and services trafficked across state lines." *Gonzales* v. *Raich*, 545 U. S. 1, 58 (2005) (THOMAS, J., dissenting). Robbery is not buying, it is not selling, and it cannot plausibly be described as a commercial transaction ("trade or exchange for value"). *Id.*, at 59.

Because Congress has no freestanding power to punish robbery and because robbery is not itself "Commerce," Congress may prohibit and punish robbery only to the extent that doing so is "necessary and proper for carrying into Execution" Congress' power to regulate commerce. Art. I, § 8, cl. 18. To be "necessary," Congress' prohibition of robbery must be "plainly adapted" to regulating interstate commerce. *McCulloch*, *supra*, at 421. This means that Congress' robbery prohibition must have an "obvious, simple, and direct relation" with the regulation of interstate commerce. *Raich*, *supra*, at 61 (THOMAS, J., dissenting) (internal quotation marks omitted). And for Congress' robbery prohibition to be "proper," it cannot be "prohibited" by the Constitution or inconsistent with its "letter and spirit." *McCulloch*, *supra*, at 421; see *United States* v. *Comstock*, 560 U. S. 126, 161 (2010) (THOMAS, J., dissenting) (same).

B

With those principles in mind, I turn to the Hobbs Act. The Act provides:

> "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or at-

> tempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be [punished]." 18 U. S. C. § 1951(a).

In keeping with Congress' authority to regulate certain commerce—but not robbery generally—the central feature of a Hobbs Act crime is an effect on commerce. The Act begins by focusing on commerce and then carefully describes the required relationship between the proscribed conduct and commerce: The Act uses active verbs—"obstructs," "delays," "affects"—to describe how a robbery must relate to commerce, making clear that a defendant's robbery must affect commerce.

The Act's reach depends on the meaning of "commerce," which the Act defines as

> "commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction." § 1951(b)(3).

As noted above, this provision is comprehensive and appears to invoke all of Congress' commerce power. The first clause of the definition invokes Congress' broad police power, including power over internal commerce, in the District of Columbia and the Territories. See Art. I, § 8, cl. 17 (District of Columbia); Art. IV, § 3, cl. 2 (Territories). The second and third clauses most clearly invoke those broad powers as well as Congress' power "[t]o regulate Commerce . . . among the several States." Art. I, § 8, cl. 3. The final clause invokes all federal commerce power not covered in the previous clauses. It invokes (to the extent that the second and third clauses do not already do so) Congress' authority "[t]o regulate Commerce with foreign Nations . . . and with the Indian Tribes." *Ibid.*

The critical question in this case is whether the commerce definition's final clause extends further, to some intrastate activity. Given the limitations imposed by the Constitution, I would construe this clause not to reach such activity.

As explained above, for the Hobbs Act to constitutionally prohibit robberies that interfere with intrastate activity, that prohibition would need to be "necessary and proper for carrying into Execution" Congress' power to regulate interstate commerce, Art. I, § 8, cls. 3, 18. See Part I–A, *supra*. Punishing a local robbery—one that affects only intrastate commerce or other intrastate activity—cannot satisfy that standard. Punishing a local robbery does not bear a "direct relation" to the regulation of interstate commerce, so it would not be "necessary." *Raich*, *supra*, at 61 (Thomas, J., dissenting) (internal quotation marks omitted). Nor would punishing such a robbery be "proper." Permitting Congress to criminalize such robberies would confer on Congress a general police power over the Nation—even though the Constitution confers no such power on Congress. *Lopez*, 514 U. S., at 566; see *Raich*, 545 U. S., at 65 (Thomas, J., dissenting). Allowing the Federal Government to reach a simple home robbery, for example, would "encroac[h] on States' traditional police powers to define the criminal law and to protect . . . their citizens." *Id.*, at 66. This would "subvert basic principles of federalism and dual sovereignty," *id.*, at 65, and would be inconsistent with the "letter and spirit" of the Constitution, *McCulloch*, 4 Wheat., at 421.

Thus, the Hobbs Act reaches a local robbery only when that particular robbery "obstructs, delays, or affects" *interstate* commerce. §§ 1951(a), (b)(3). So construed, the Hobbs Act validly punishes robbery. Congress' power "[t]o regulate Commerce . . . among the several States," Art. I, § 8, cl. 3, "would lack force or practical effect if Congress lacked the authority to enact criminal laws" prohibiting interference with interstate commerce or the movement of articles or goods in interstate commerce, *Comstock*, *supra*, at 169 (THOMAS, J., dissenting). The Hobbs Act's prohibition on such interferences thus helps to "carr[y] into Execution" Congress' enumerated power to regulate interstate commerce. Art. I, § 8, cls. 3, 18. A prohibition on such interference by robbery bears an "obvious, simple, and direct relation" to regulating interstate commerce: It allows commerce to flow between States unobstructed. *Raich*, *supra*, at 61 (THOMAS, J., dissenting) (internal quotation marks omitted). It is therefore "necessary." And such a prohibition accords with the limited nature of the powers that the Constitution confers on Congress, by adhering to the categories of commerce that the Constitution authorizes Congress to regulate and by keeping Congress from exercising a general police power. See, *e. g.*, *Lopez*, *supra*, at 566. It is accordingly "proper" to that extent. If construed to reach a robbery that does not affect interstate commerce, however, the Hobbs Act exceeds Congress' authority because it is no longer "necessary and proper" to the execution of Congress' power "[t]o regulate Commerce . . . among the several States," Art. I, § 8, cls. 3, 18. See Part I–A, *supra*.

Robberies that might satisfy these principles would be those that affect the channels of interstate commerce or instrumentalities of interstate commerce. A robbery that forces an interstate freeway to shut down thus may form the basis for a valid Hobbs Act conviction. So too might a robbery of a truckdriver who is in the course of transporting commercial goods across state lines. But if the Government cannot prove that a robbery in a State affected interstate commerce, then the robbery is not punishable under the Hobbs Act. Sweeping in robberies that do not affect interstate commerce comes too close to conferring on Congress a general police power over the Nation.

Given the Hobbs Act's text and relevant constitutional principles, the Government in a Hobbs Act robbery case (at least one that involves only intrastate robbery) must prove, beyond a reasonable doubt, that the defendant's robbery itself affected interstate commerce. See *Alleyne* v. *United States*, 570 U. S. 99, 104 (2013) (plurality opinion) (the Sixth Amendment right to a trial " 'by an impartial jury,' " in conjunction with our due process precedents, "requires that each element of a crime be proved to the jury beyond a reasonable doubt"); *In re Winship*, 397 U. S. 358, 364 (1970) (requiring reasonable-doubt showing on each element of a crime).

C

On this interpretation of the Hobbs Act, petitioner David Anthony Taylor's convictions cannot stand. The Government cites no evidence that Taylor actually obstructed, delayed, or affected interstate commerce when he committed the two intrastate robberies here. The Government did not prove that Taylor affected any channel of interstate commerce, instrumentality of commerce, or person or thing in interstate commerce. See *Lopez*, *supra*, at 558–559 (describing these core areas of commerce regulation). Nor did the Government prove that Taylor affected an actual commercial transaction—let alone an interstate commercial transaction. At most, the Government proved instead that Taylor robbed two drug dealers in their homes in Virginia; that the marijuana that Taylor expected to (but did not) find in these robberies might possibly at some point have crossed state lines; and that Taylor expected to find large amounts of marijuana. See Brief for United States 35–37; Tr. 63–69, 354, 420–421. Under the principles set forth above, that is not sufficient to bring Taylor's robberies within the Hobbs Act's reach. We should reverse Taylor's Hobbs Act convictions.

II

Upholding Taylor's convictions, the Court reads the Hobbs Act differently. See *ante*, at 306–310. The Court concludes that the "commerce over which the United States has jurisdiction," § 1951(b)(3), includes intrastate activity. See *ante,* at 306–307. Under our modern precedents, as the Court notes, Congress may regulate not just the channels of interstate commerce, instrumentalities of interstate commerce, and persons or things moving in interstate commerce, but may also regulate "those activities having a substantial relation to interstate commerce, . . . *i. e.*, those activities that substantially affect interstate commerce." *Lopez*, *supra*, at 558–559; see *Wickard* v. *Filburn*, 317 U. S. 111, 125 (1942) ("[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce"). The substantial-effects approach is broad, in part because of its "aggregation principle": Congress can regulate an activity—even an intrastate, noncommercial activity—if that activity falls within a "class of activities" that, "as a whole," "substantially affects interstate commerce," even if "any specific activity within the class" has no such effects "when considered in isolation." *Lopez*, 514 U. S., at 600 (THOMAS, J., concurring) (emphasis deleted). According to the Court, the final clause of the Hobbs Act's definition of commerce embraces this category of activities that, in the aggregate, substantially affect commerce. See *ante,* at 306–307. Any robbery that targets a marijuana dealer, the Court then holds, affects the type of intrastate activity that Congress may regulate under its commerce power. See *ante,* at 306–310. For at least three reasons, the Court's holding is in error.

A

Although our modern precedents (such as *Wickard*) embrace the substantial-effects approach, applying that approach to the Hobbs Act is tantamount to abandoning any limits on Congress' commerce power—even the slight limits recognized by our expansive modern precedents. As I have explained, if the Hobbs Act is construed to punish a robbery that by itself affects only intrastate activity, then the Act defies the constitutional design. See Part I, *supra*.

That is true even under our modern precedents. Even those precedents emphasize that "[t]he Constitution requires a distinction between what is truly national and what is truly local." *United States* v. *Morrison*, 529 U. S. 598, 617–618 (2000); see *Lopez*, 514 U. S., at 567–568. The substantial-effects approach is at war with that principle. To avoid giving Congress a general police power, there must be some limit to what Congress can regulate. But the substantial-effects approach's aggregation principle "has no stopping point." *Id.*, at 600 (THOMAS, J., concurring). "[O]ne *always* can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce." *Ibid.* Under the substantial-effects approach, Congress could, under its commerce power, regulate *any* robbery: In the aggregate, any type of robbery could be deemed to substantially affect interstate commerce.

By applying the substantial-effects test to the criminal prohibition before us, the Court effectively gives Congress a police power. That is why the Court cannot identify any true limit on its understanding of the commerce power. Although the Court maintains that its holding "is limited to cases in which the defendant targets drug dealers for the purpose of stealing drugs or drug proceeds," *ante*, at 310, its reasoning allows for unbounded regulation. Given that the Hobbs Act can be read in a way that does not give Congress a general police power, see Part I, *supra*, we should not construe the statute as the Court does today.

B

Applying the substantial-effects approach is especially unsound here because it effectively relieves the Government of its central burden in a criminal case—the burden to prove every element beyond a reasonable doubt—and because the Court's holding does not follow from even our broad precedents. The Court reasons that, under *Gonzales* v. *Raich*, 545 U. S. 1—a case that rests on substantial-effects reasoning, see *id.*, at 17–22—"the market for marijuana, including its intrastate aspects, is 'commerce over which the United States has jurisdiction.'" *Ante*, at 307 (quoting § 1951(b)(3)). Therefore, "a robber who affects or attempts to affect even the intrastate sale of marijuana grown within the State affects or attempts to affect commerce over which the United States has jurisdiction." *Ante*, at 307. As the Court later states, "[W]here the target of a robbery is a drug dealer, proof that the defendant's conduct in and of itself affected or threatened commerce is not needed. All that is needed is proof that the defendant's conduct fell within a category of conduct that, in the aggregate, had the requisite effect." *Ante*, at 309.

Raich is too thin a reed to support the Court's holding. *Raich* upheld the federal Controlled Substances Act's regulation of "the intrastate manufacture and possession of marijuana" for personal medical use, 545 U. S., at 15, on the view that Congress "had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana" would undercut federal regulation of the broader interstate marijuana market, *id.*, at 22. The Court "stress[ed]" that it did not "need [to] determine whether [local cultivation and possession of marijuana], taken in the aggregate, substantially affect[ed] interstate commerce in fact, but only whether a 'rational basis' exist[ed] for so concluding." *Ibid.*

As an initial matter, *Raich* did not, as the Court suggests, hold that "the market for marijuana, including its intrastate aspects, is '*commerce* over which the United States has jurisdiction.'" *Ante*, at 307 (emphasis added). *Raich* held at most that the market for marijuana comprises *activities* that may substantially affect commerce over which the United States has jurisdiction. See, *e. g.*, *Raich*, *supra*, at 21–22. Those activities are not necessarily "commerce," so

Raich's holding does not establish what the Hobbs Act's text requires.

But even if *Raich* established that the intrastate aspects of the marijuana market are "commerce over which the United States has jurisdiction," § 1951(b)(3), *Raich* still would not establish the further point that the Court needs for its conclusion. Specifically, *Raich* would not establish that a robbery affecting a drug dealer establishes, beyond a reasonable doubt, that the robber actually "obstructs, delays, or affects" the marijuana market. § 1951(a). *Raich* did not hold that any activity relating to the marijuana market *in fact* affects commerce. *Raich* instead disclaimed the need to "determine whether" activities relating to the marijuana market—even "taken in the aggregate"—"substantially affect interstate commerce in fact." 545 U. S., at 22. *Raich* decided only that Congress had a rational basis—a merely " 'conceivable' " basis, *FCC* v. *Beach Communications, Inc.*, 508 U. S. 307, 315 (1993)—for thinking that it needed to regulate that activity as part of an effective regulatory regime. 545 U. S., at 22. That is far from a finding, beyond a reasonable doubt, that a particular robbery relating to marijuana is an activity that affects interstate commerce. Grafting *Raich*'s "holding . . . onto the commerce element of the Hobbs Act" thus does not lead to the conclusion that "a robber who affects or attempts to affect . . . the intrastate sale of marijuana grown within [a] State affects or attempts to affect"—beyond a reasonable doubt—"commerce over which the United States has jurisdiction." *Ante*, at 307.

The Court's analysis thus provides no assurance that the Government has proved beyond a reasonable doubt that a Hobbs Act robbery defendant in fact affected commerce. And it unnecessarily extends our already broad precedents.

C

Finally, today's decision weakens longstanding protections for criminal defendants. The criminal law imposes especially high burdens on the Government in order to protect the rights of the accused. The Government may obtain a conviction only "upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the accused] is charged." *Winship*, 397 U. S., at 364. Those elements must be proved to a jury. Amdt. 6; see *Alleyne*, 570 U. S., at 104 (plurality opinion). Given the harshness of criminal penalties on "the rights of individuals," the Court has long recognized that penal laws "are to be construed strictly" to ensure that Congress has indeed decided to make the conduct at issue criminal. *United States* v. *Wiltberger*, 5 Wheat. 76, 95 (1820) (Marshall, C. J.). Thus, "before a man can be punished as a criminal under the federal law his case must be plainly and unmistakably within the provisions of some statute." *United States* v. *Gradwell*, 243 U. S. 476, 485 (1917) (internal quotation marks omitted). When courts construe criminal statutes, then, they must be especially careful. And when a broad reading of a criminal statute would upset federalism, courts must be more careful still. "[U]nless Congress conveys its purpose clearly," we do not deem it "to have significantly changed the federal-state balance in the prosecution of crimes." *Jones* v. *United States*, 529 U. S. 848, 858 (2000) (internal quotation marks omitted).

The substantial-effects test is in tension with these principles. That test—and the deferential, rational-basis review to which it is subjected, see *Raich, supra,* at 22—puts virtually no burdens on the Government. That should not come as a surprise because the substantial-effects test gained momentum not in the criminal context, but instead in the context in which courts most defer to the Government: the regulatory arena. *E. g., Wickard*, 317 U. S., at 113, 122–125, 128–129 (relying on substantial-effects reasoning to uphold regulatory restrictions on wheat under the Agricultural Adjustment Act of 1938). Without adequate reflection, the Court later extended this approach to the criminal context. In *Perez* v. *United States*, 402 U. S. 146 (1971), for example, the Court applied the substantial-effects approach to a criminal statute, holding that Congress could criminally punish loansharking under its commerce power because "[e]xtortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce" when judged as a "class of activities." *Id.*, at 154 (emphasis deleted); see *id.*, at 151–154, 156–157.

Even in extending the substantial-effects approach, however, the Court still tried to impose some of the recognized limits on the Government in the criminal context. Just a year before it decided *Perez*, for example, the Court held that the Government must prove each charged element of a crime beyond a reasonable doubt. *Winship*, *supra*, at 364. And the Court shortly thereafter gave a potentially broad federal statute a narrow reading—a reading that required a prohibited act to have a "demonstrated nexus with interstate commerce," rather than a lesser showing—based on lenity and federalism. *United States* v. *Bass*, 404 U. S. 336, 349 (1971); see *id.*, at 339, 347–350. Indeed, the Court soon again invoked those same principles in rejecting a broad interpretation of the Hobbs Act itself. See *United States* v. *Enmons*, 410 U. S. 396, 410–412 (1973) (invoking principles of lenity and federalism in construing the Hobbs Act not to reach the use of violence to achieve legitimate union objectives).

Today, however, the Court fails to apply even those limits. Today's decision fails to hold the Government to its burden to prove, beyond a reasonable doubt, that the defendant's robbery itself affected commerce. It fails to identify language in the Hobbs Act that "'conveys . . . clearly'" Congress' intention to reach the sorts of local, small-scale robberies that States traditionally prosecute. *Jones*, *supra*, at 858. And it fails to take our traditionally careful approach to construing criminal statutes. Given the problems with the Court's expansive reading of the Hobbs Act, we cannot be sure that Taylor's "case" is "plainly and unmistakably within the provisions of" the Act. *Gradwell*, *supra*, at 485 (internal quotation marks omitted). It does not matter that Taylor committed a crime akin to the one that the Hobbs Act punishes. "It would be dangerous" to punish someone for "a crime not enumerated in the statute" merely "because it is of equal atrocity, or of kindred character, with those which are enumerated." *Wiltberger*, *supra*, at 96.

The Court takes that "dangerous" step—and other dangerous steps—today. It construes the Hobbs Act in a way that conflicts with the Constitution, with our precedents, and with longstanding protections for the accused. I would interpret the Hobbs Act in a way that is consistent with its text and with the Constitution.

* * *

For these reasons, I respectfully dissent.

RJR NABISCO, INC., ET AL. *v.* EUROPEAN COMMUNITY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 15–138. Argued March 21, 2016—Decided June 20, 2016

The Racketeer Influenced and Corrupt Organizations Act (RICO) prohibits certain activities of organized crime groups in relation to an enterprise. RICO makes it a crime to invest income derived from a pattern of racketeering activity in an enterprise "which is engaged in, or the activities of which affect, interstate or foreign commerce," 18 U. S. C. § 1962(a); to acquire or maintain an interest in an enterprise through a pattern of racketeering activity, § 1962(b); to conduct an enterprise's affairs through a pattern of racketeering activity, § 1962(c); and to conspire to violate any of the other three prohibitions, § 1962(d). RICO also provides a civil cause of action for "[a]ny person injured in his business or property by reason of a violation" of those prohibitions. § 1964(c).

Respondents (the European Community and 26 of its member states) filed suit under RICO, alleging that petitioners (RJR Nabisco and related entities (collectively RJR)) participated in a global money-laundering scheme in association with various organized crime groups. Under the alleged scheme, drug traffickers smuggled narcotics into Europe and sold them for euros that—through transactions involving black-market money brokers, cigarette importers, and wholesalers—were used to pay for large shipments of RJR cigarettes into Europe. The complaint alleged that RJR violated §§ 1962(a)–(d) by engaging in a pattern of racketeering activity that included numerous predicate acts of money laundering, material support to foreign terrorist organizations, mail fraud, wire fraud, and violations of the Travel Act. The District Court granted RJR's motion to dismiss on the ground that RICO does not apply to racketeering activity occurring outside U. S. territory or to foreign enterprises. The Second Circuit reinstated the claims, however, concluding that RICO applies extraterritorially to the same extent as the predicate acts of racketeering that underlie the alleged RICO violation, and that certain predicates alleged in this case expressly apply extraterritorially. In denying rehearing, the court held further that RICO's civil action does not require a domestic injury, but permits recovery for a foreign injury caused by the violation of a predicate statute that applies extraterritorially.

Held:

1. The law of extraterritoriality provides guidance in determining RICO's reach to events outside the United States. The Court applies

a canon of statutory construction known as the presumption against extraterritoriality: Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application. *Morrison* v. *National Australia Bank Ltd.*, 561 U. S. 247, 255. *Morrison* and *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U. S. 108, reflect a two-step framework for analyzing extraterritoriality issues. First, the Court asks whether the presumption against extraterritoriality has been rebutted—*i. e.*, whether the statute gives a clear, affirmative indication that it applies extraterritorially. This question is asked regardless of whether the particular statute regulates conduct, affords relief, or merely confers jurisdiction. If, and only if, the statute is not found extraterritorial at step one, the Court moves to step two, where it examines the statute's "focus" to determine whether the case involves a domestic application of the statute. If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the relevant conduct occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of whether other conduct occurred in U. S. territory. In the event the statute is found to have clear extraterritorial effect at step one, then the statute's scope turns on the limits Congress has or has not imposed on the statute's foreign application, and not on the statute's "focus." Pp. 335–338.

2. The presumption against extraterritoriality has been rebutted with respect to certain applications of RICO's substantive prohibitions in § 1962. Pp. 338–345.

(a) RICO defines racketeering activity to include a number of predicates that plainly apply to at least some foreign conduct, such as the prohibition against engaging in monetary transactions in criminally derived property, § 1957(d)(2), the prohibitions against the assassination of Government officials, §§ 351(i), 1751(k), and the prohibition against hostage taking, § 1203(b). Congress has thus given a clear, affirmative indication that § 1962 applies to foreign racketeering activity—but only to the extent that the predicates alleged in a particular case themselves apply extraterritorially. This fact is determinative as to §§ 1962(b) and (c), which both prohibit the employment of a pattern of racketeering. But § 1962(a), which targets certain uses of income derived from a pattern of racketeering, arguably extends only to domestic uses of that income. Because the parties have not focused on this issue, and because its resolution does not affect this case, it is assumed that respondents have pleaded a domestic investment of racketeering income in violation of § 1962(a). It is also assumed that the extraterritoriality of a violation of RICO's conspiracy provision, § 1962(d), tracks that of the RICO provision underlying the alleged conspiracy. Pp. 338–341.

(b) RJR contends that RICO's "focus" is its enterprise element, which gives no clear indication of extraterritorial effect. But focus is considered only when it is necessary to proceed to the inquiry's second step. See *Morrison, supra,* at 267, n. 9. Here, however, there is a clear indication at step one that at least §§ 1962(b) and (c) apply to all transnational patterns of racketeering, subject to the stated limitation. A domestic enterprise requirement would lead to difficult line-drawing problems and counterintuitive results, such as excluding from RICO's reach foreign enterprises that operate within the United States. Such troubling consequences reinforce the conclusion that Congress intended the §§ 1962(b) and (c) prohibitions to apply extraterritorially in tandem with the underlying predicates, without regard to the locus of the enterprise. Of course, foreign enterprises will qualify only if they engage in, or significantly affect, commerce directly involving the United States. Pp. 341–344.

(c) Applying these principles here, respondents' allegations that RJR violated §§ 1962(b) and (c) do not involve an impermissibly extraterritorial application of RICO. The Court assumes that the alleged pattern of racketeering activity consists entirely of predicate offenses that were either committed in the United States or committed in a foreign country in violation of a predicate statute that applies extraterritorially. The alleged enterprise also has a sufficient tie to U. S. commerce, as its members include U. S. companies and its activities depend on sales of RJR's cigarettes conducted through "the U. S. mails and wires," among other things. Pp. 344–345.

3. Irrespective of any extraterritoriality of § 1962's substantive provisions, § 1964(c)'s private right of action does not overcome the presumption against extraterritoriality, and thus a private RICO plaintiff must allege and prove a domestic injury. Pp. 346–355.

(a) The Second Circuit reasoned that the presumption against extraterritoriality did not apply to § 1964(c) independently of its application to § 1962's substantive provisions because § 1964(c) does not regulate conduct. But this view was rejected in *Kiobel,* 569 U. S., at 116, and the logic of that decision requires that the presumption be applied separately to RICO's cause of action even though it has been overcome with respect to RICO's substantive prohibitions. As in other contexts, allowing recovery for foreign injuries in a civil RICO action creates a danger of international friction that militates against recognizing foreign-injury claims without clear direction from Congress. Respondents, in arguing that such concerns are inapplicable here because the plaintiffs are not foreign citizens seeking to bypass their home countries' less generous remedies but are foreign countries themselves, forget that this Court's interpretation of § 1964(c)'s injury requirement will necessarily govern suits by nongovernmental plaintiffs. The Court will not forgo the presumption against extraterritoriality to permit extraterritorial suits based on a case-by-case inquiry that turns on or looks to the affected sovereign's consent. Nor will the Court adopt a double standard that would treat suits by foreign sovereigns more favorably than other suits. Pp. 346–349.

(b) Section 1964(c) does not provide a clear indication that Congress intended to provide a private right of action for injuries suffered outside of the United States. It provides a cause of action to "[a]ny person injured in his business or property" by a violation of § 1962, but neither the word "any" nor the reference to injury to "business or property" indicates extraterritorial application. Respondents' arguments to the contrary are unpersuasive. In particular, while they are correct that RICO's private right of action was modeled after § 4 of the Clayton Act, which allows recovery for injuries suffered abroad as a result of antitrust violations, see *Pfizer Inc.* v. *Government of India*, 434 U. S. 308, 314–315, this Court has declined to transplant features of the Clayton Act's cause of action into the RICO context where doing so would be inappropriate, cf. *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 485, 495. There is good reason not to do so here. Most importantly, RICO lacks the very language that the Court found critical to its decision in *Pfizer*, namely, the Clayton Act's definition of a "person" who may sue, which "explicitly includes 'corporations and associations existing under or authorized by . . . the laws of any foreign country,' " 434 U. S., at 313. Congress's more recent decision to exclude from the antitrust laws' reach most conduct that "causes only foreign injury," *F. Hoffmann-La Roche Ltd* v. *Empagran S. A.*, 542 U. S. 155, 158, also counsels against importing into RICO those Clayton Act principles that are at odds with the Court's current extraterritoriality doctrine. Pp. 349–354.

(c) Section 1964(c) requires a civil RICO plaintiff to allege and prove a domestic injury to business or property and does not allow recovery for foreign injuries. Respondents waived their domestic-injury damages claims, so the District Court dismissed them with prejudice. Their remaining RICO damages claims therefore rest entirely on injury suffered abroad and must be dismissed. P. 354.

764 F. 3d 129, reversed and remanded.

Alito, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy and Thomas, JJ., joined, and in which Ginsburg, Breyer, and Kagan, JJ., joined as to Parts I, II, and III. Ginsburg, J., filed an opinion concurring in part, dissenting in part, and dissenting from the judgment, in which Breyer and Kagan, JJ., joined, *post*, p. 355. Breyer, J., filed an opinion concurring in part, dissenting in part, and dissenting from the judgment, *post*, p. 363. SOTOMAYOR, J., took no part in the consideration or decision of the case.

Gregory G. Katsas argued the cause for petitioners. With him on the briefs were *Hashim M. Mooppan*, *Anthony J. Dick*, and *Emily J. Kennedy*.

Elaine J. Goldenberg argued the cause for the United States as *amicus curiae* urging vacatur. With her on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Caldwell*, *Principal Deputy Assistant Attorney General Mizer*, *Deputy Solicitor General Dreeben*, *Douglas N. Letter*, and *Lewis S. Yelin*.

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JUSTICE ALITO delivered the opinion of the Court.

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. §§ 1961–1968, created four new criminal offenses involving the activities of organized criminal groups in relation to an enterprise. §§ 1962(a)–(d). RICO also created a new civil cause of action for "[a]ny person injured in his business or property by reason of a violation" of those prohibitions. § 1964(c). We are asked to decide whether RICO applies extraterritorially—that is, to events occurring and injuries suffered outside the United States.

I

A

RICO is founded on the concept of racketeering activity. The statute defines "racketeering activity" to encompass

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*Briefs of *amici curiae* urging reversal were filed for the National Foreign Trade Council by *Timothy P. Harkness*, *Elliot Friedman*, *David Y. Livshiz*, and *Leah Friedman*; and for the Washington Legal Foundation et al. by *Cory L. Andrews*.

dozens of state and federal offenses, known in RICO parlance as predicates. These predicates include any act "indictable" under specified federal statutes, §§ 1961(1)(B)–(C), (E)–(G), as well as certain crimes "chargeable" under state law, § 1961(1)(A), and any offense involving bankruptcy or securities fraud or drug-related activity that is "punishable" under federal law, § 1961(1)(D). A predicate offense implicates RICO when it is part of a "pattern of racketeering activity"—a series of related predicates that together demonstrate the existence or threat of continued criminal activity. *H. J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U. S. 229, 239 (1989); see § 1961(5) (specifying that a "pattern of racketeering activity" requires at least two predicates committed within 10 years of each other).

RICO's § 1962 sets forth four specific prohibitions aimed at different ways in which a pattern of racketeering activity may be used to infiltrate, control, or operate "a[n] enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." These prohibitions can be summarized as follows. Section 1962(a) makes it unlawful to invest income derived from a pattern of racketeering activity in an enterprise. Section 1962(b) makes it unlawful to acquire or maintain an interest in an enterprise through a pattern of racketeering activity. Section 1962(c) makes it unlawful for a person employed by or associated with an enterprise to conduct the enterprise's affairs through a pattern of racketeering activity. Finally, § 1962(d) makes it unlawful to conspire to violate any of the other three prohibitions.[1]

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[1] In full, 18 U. S. C. § 1962 provides:

"(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of

Violations of § 1962 are subject to criminal penalties, § 1963(a), and civil proceedings to enforce those prohibitions may be brought by the Attorney General, §§ 1964(a)–(b). Separately, RICO creates a private civil cause of action that allows "[a]ny person injured in his business or property by reason of a violation of section 1962" to sue in federal district court and recover treble damages, costs, and attorney's fees. § 1964(c).[2]

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securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

"(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

"(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

"(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

The attentive reader will notice that these prohibitions concern not only patterns of racketeering activity but also the collection of unlawful debt. As is typical in our RICO cases, we have no occasion here to address this aspect of the statute.

[2] In full, § 1964(c) provides:

"Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply

B

This case arises from allegations that petitioners—RJR Nabisco and numerous related entities (collectively RJR)—participated in a global money-laundering scheme in association with various organized crime groups. Respondents—the European Community and 26 of its member states—first sued RJR in the Eastern District of New York in 2000, alleging that RJR had violated RICO. Over the past 16 years, the resulting litigation (spread over at least three separate actions, with this case the lone survivor) has seen multiple complaints and multiple trips up and down the federal court system. See 2011 WL 843957, *1–*2 (EDNY, Mar. 8, 2011) (tracing the procedural history through the District Court's dismissal of the present complaint). In the interest of brevity, we confine our discussion to the operative complaint and its journey to this Court.

Greatly simplified, the complaint alleges a scheme in which Colombian and Russian drug traffickers smuggled narcotics into Europe and sold the drugs for euros that—through a series of transactions involving black-market money brokers, cigarette importers, and wholesalers—were used to pay for large shipments of RJR cigarettes into Europe. In other variations of this scheme, RJR allegedly dealt directly with drug traffickers and money launderers in South America and sold cigarettes to Iraq in violation of international sanctions. RJR is also said to have acquired Brown & Williamson Tobacco Corporation for the purpose of expanding these illegal activities.

The complaint alleges that RJR engaged in a pattern of racketeering activity consisting of numerous acts of money laundering, material support to foreign terrorist organizations, mail fraud, wire fraud, and violations of the Travel Act.

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to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final."

RJR, in concert with the other participants in the scheme, allegedly formed an association in fact that was engaged in interstate and foreign commerce, and therefore constituted a RICO enterprise that the complaint dubs the "RJR Money-Laundering Enterprise." App. to Pet. for Cert. 238a, Complaint ¶158; see § 1961(4) (defining an enterprise to include "any union or group of individuals associated in fact although not a legal entity").

Putting these pieces together, the complaint alleges that RJR violated each of RICO's prohibitions. RJR allegedly used income derived from the pattern of racketeering to invest in, acquire an interest in, and operate the RJR Money-Laundering Enterprise in violation of § 1962(a); acquired and maintained control of the enterprise through the pattern of racketeering in violation of § 1962(b); operated the enterprise through the pattern of racketeering in violation of § 1962(c); and conspired with other participants in the scheme in violation of § 1962(d).[3] These violations allegedly harmed respondents in various ways, including through competitive harm to their state-owned cigarette businesses, lost tax revenue from black-market cigarette sales, harm to European financial institutions, currency instability, and increased law enforcement costs.[4]

RJR moved to dismiss the complaint, arguing that RICO does not apply to racketeering activity occurring outside U. S. territory or to foreign enterprises. The District Court

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[3] The complaint also alleges that RJR committed a variety of state-law torts. Those claims are not before us.

[4] At an earlier stage of respondents' litigation against RJR, the Second Circuit "held that the revenue rule barred the foreign sovereigns' civil claims for recovery of lost tax revenue and law enforcement costs." *European Community* v. *RJR Nabisco, Inc.*, 424 F. 3d 175, 178 (2005) (Sotomayor, J.), cert. denied, 546 U. S. 1092 (2006). It is unclear why respondents subsequently included these alleged injuries in their present complaint; they do not ask us to disturb or distinguish the Second Circuit's holding that such injuries are not cognizable. We express no opinion on the matter. Cf. *Pasquantino* v. *United States*, 544 U. S. 349, 355, n. 1 (2005).

agreed and dismissed the RICO claims as impermissibly extraterritorial. 2011 WL 843957, *7.

The Second Circuit reinstated the RICO claims. It concluded that, "with respect to a number of offenses that constitute predicates for RICO liability and are alleged in this case, Congress has clearly manifested an intent that they apply extraterritorially." 764 F. 3d 129, 133 (2014). "By incorporating these statutes into RICO as predicate racketeering acts," the court reasoned, "Congress has clearly communicated its intention that RICO apply to extraterritorial conduct to the extent that extraterritorial violations of these statutes serve as the basis for RICO liability." *Id.*, at 137. Turning to the predicates alleged in the complaint, the Second Circuit found that they passed muster. The court concluded that the money laundering and material support of terrorism statutes expressly apply extraterritorially in the circumstances alleged in the complaint. *Id.*, at 139–140. The court held that the mail fraud, wire fraud, and Travel Act statutes do *not* apply extraterritorially. *Id.*, at 141. But it concluded that the complaint states *domestic* violations of those predicates because it "allege[s] conduct in the United States that satisfies every essential element" of those offenses. *Id.*, at 142.

RJR sought rehearing, arguing (among other things) that RICO's civil cause of action requires a plaintiff to allege a domestic *injury*, even if a domestic pattern of racketeering or a domestic enterprise is not necessary to make out a violation of RICO's substantive prohibitions. The panel denied rehearing and issued a supplemental opinion holding that RICO does not require a domestic injury. 764 F. 3d 149 (CA2 2014) (*per curiam*). If a foreign injury was caused by the violation of a predicate statute that applies extraterritorially, the court concluded, then the plaintiff may seek recovery for that injury under RICO. *Id.*, at 151. The Second Circuit later denied rehearing en banc, with five judges dissenting. 783 F. 3d 123 (2015).

The lower courts have come to different conclusions regarding RICO's extraterritorial application. Compare 764 F. 3d 129 (case below) (holding that RICO may apply extraterritorially) with *United States* v. *Chao Fan Xu*, 706 F. 3d 965, 974–975 (CA9 2013) (holding that RICO does not apply extraterritorially; collecting cases). Because of this conflict and the importance of the issue, we granted certiorari. 576 U. S. 1095 (2015).

II

The question of RICO's extraterritorial application really involves two questions. First, do RICO's substantive prohibitions, contained in § 1962, apply to conduct that occurs in foreign countries? Second, does RICO's private right of action, contained in § 1964(c), apply to injuries that are suffered in foreign countries? We consider each of these questions in turn. To guide our inquiry, we begin by reviewing the law of extraterritoriality.

It is a basic premise of our legal system that, in general, "United States law governs domestically but does not rule the world." *Microsoft Corp.* v. *AT&T Corp.*, 550 U. S. 437, 454 (2007). This principle finds expression in a canon of statutory construction known as the presumption against extraterritoriality: Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application. *Morrison* v. *National Australia Bank Ltd.*, 561 U. S. 247, 255 (2010). The question is not whether we think "Congress would have wanted" a statute to apply to foreign conduct "if it had thought of the situation before the court," but whether Congress has affirmatively and unmistakably instructed that the statute will do so. *Id.*, at 261. "When a statute gives no clear indication of an extraterritorial application, it has none." *Id.*, at 255.

There are several reasons for this presumption. Most notably, it serves to avoid the international discord that can result when U. S. law is applied to conduct in foreign countries. See, *e. g.*, *Kiobel* v. *Royal Dutch Petroleum Co.*, 569

U. S. 108, 115–116 (2013); *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 248 (1991); *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138, 147 (1957). But it also reflects the more prosaic "commonsense notion that Congress generally legislates with domestic concerns in mind." *Smith* v. *United States*, 507 U. S. 197, 204, n. 5 (1993). We therefore apply the presumption across the board, "regardless of whether there is a risk of conflict between the American statute and a foreign law." *Morrison*, *supra*, at 255.

Twice in the past six years we have considered whether a federal statute applies extraterritorially. In *Morrison*, we addressed the question whether § 10(b) of the Securities Exchange Act of 1934 applies to misrepresentations made in connection with the purchase or sale of securities traded only on foreign exchanges. We first examined whether § 10(b) gives any clear indication of extraterritorial effect, and found that it does not. 561 U. S., at 262–265. We then engaged in a separate inquiry to determine whether the complaint before us involved a permissible *domestic* application of § 10(b) because it alleged that some of the relevant misrepresentations were made in the United States. At this second step, we considered the " 'focus' of congressional concern," asking whether § 10(b)'s focus is "the place where the deception originated" or rather "purchases and sale of securities in the United States." *Id.*, at 266. We concluded that the statute's focus is on domestic securities transactions, and we therefore held that the statute does not apply to frauds in connection with foreign securities transactions, even if those frauds involve domestic misrepresentations.

In *Kiobel*, we considered whether the Alien Tort Statute (ATS) confers federal-court jurisdiction over causes of action alleging international-law violations committed overseas. We acknowledged that the presumption against extraterritoriality is "typically" applied to statutes "regulating conduct," but we concluded that the principles supporting the presumption should "similarly constrain courts considering causes of action that may be brought under the ATS." 569 U. S., at 116. We applied the presumption and held that the ATS lacks any clear indication that it extended to the foreign violations alleged in that case. *Id.*, at 117–124. Because "all the relevant conduct" regarding those violations "took place outside the United States," *id.*, at 124, we did not need to determine, as we did in *Morrison*, the statute's "focus."

Morrison and *Kiobel* reflect a two-step framework for analyzing extraterritoriality issues. At the first step, we ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially. We must ask this question regardless of whether the statute in question regulates conduct, affords relief, or merely confers jurisdiction. If the statute is not extraterritorial, then at the second step we determine whether the case involves a domestic application of the statute, and we do this by looking to the statute's "focus." If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U. S. territory.

What if we find at step one that a statute clearly *does* have extraterritorial effect? Neither *Morrison* nor *Kiobel* involved such a finding. But we addressed this issue in *Morrison*, explaining that it was necessary to consider § 10(b)'s "focus" only because we found that the statute does not apply extraterritorially: "If § 10(b) did apply abroad, we would not need to determine which transnational frauds it applied to; it would apply to all of them (barring some other limitation)." 561 U. S., at 267, n. 9. The scope of an extraterritorial statute thus turns on the limits Congress has (or has not) imposed on the statute's foreign application, and not on the statute's "focus."[5]

III

With these guiding principles in mind, we first consider whether RICO's substantive prohibitions in § 1962 may apply to foreign conduct. Unlike in *Morrison* and *Kiobel*, we find that the presumption against extraterritoriality has been rebutted—but only with respect to certain applications of the statute.

A

The most obvious textual clue is that RICO defines racketeering activity to include a number of predicates that plainly apply to at least some foreign conduct. These predicates include the prohibition against engaging in monetary transactions in criminally derived property, which expressly applies, when "the defendant is a United States person," to offenses that "tak[e] place outside the United States." 18 U. S. C. § 1957(d)(2). Other examples include the prohibitions against the assassination of Government officials, § 351(i) ("There is extraterritorial jurisdiction over the conduct prohibited by this section"); § 1751(k) (same), and the prohibition against hostage taking, which applies to conduct that "occurred outside the United States" if either the hostage or the offender is a U. S. national, if the offender is found in the United States, or if the hostage taking is done to compel action by the U. S. Government, § 1203(b). At least one predicate—the prohibition against "kill[ing] a national of the United States, while such national is outside the United States"—applies *only* to conduct occurring outside the United States. § 2332(a).

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[5] Because a finding of extraterritoriality at step one will obviate step two's "focus" inquiry, it will usually be preferable for courts to proceed in the sequence that we have set forth. But we do not mean to preclude courts from starting at step two in appropriate cases. Cf. *Pearson* v. *Callahan*, 555 U. S. 223, 236–243 (2009).

We agree with the Second Circuit that Congress's incorporation of these (and other) extraterritorial predicates into RICO gives a clear, affirmative indication that § 1962 applies to foreign racketeering activity—but only to the extent that the predicates alleged in a particular case themselves apply extraterritorially. Put another way, a pattern of racketeering activity may include or consist of offenses committed abroad in violation of a predicate statute for which the presumption against extraterritoriality has been overcome. To give a simple (albeit grim) example, a violation of § 1962 could be premised on a pattern of killings of Americans abroad in violation of § 2332(a)—a predicate that all agree applies extraterritorially—whether or not any domestic predicates are also alleged.[6]

We emphasize the important limitation that foreign conduct must violate "a predicate statute that manifests an unmistakable congressional intent to apply extraterritorially." 764 F. 3d, at 136. Although a number of RICO predicates have extraterritorial effect, many do not. The inclusion of *some* extraterritorial predicates does not mean that *all* RICO predicates extend to foreign conduct. This is apparent for two reasons. First, "when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." *Morrison*, 561 U. S., at 265. Second, RICO defines as racketeering activity only acts that are "indictable" (or, what amounts to the same thing, "chargeable" or "punishable") under one of the statutes identified in § 1961(1). If a particular statute does not apply extraterritorially, then conduct committed abroad is not "indictable" under that statute and so cannot qualify as a predicate under RICO's plain terms.

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[6] The foreign killings would, of course, still have to satisfy the relatedness and continuity requirements of RICO's pattern element. See *H. J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U. S. 229 (1989).

RJR resists the conclusion that RICO's incorporation of extraterritorial predicates gives RICO commensurate extraterritorial effect. It points out that "RICO itself" does not refer to extraterritorial application; only the underlying predicate statutes do. Brief for Petitioners 42. RJR thus argues that Congress could have intended to capture only *domestic* applications of extraterritorial predicates, and that any predicates that apply only abroad could have been "incorporated . . . solely for when such offenses are part of a broader pattern whose overall locus is domestic." *Id.*, at 43.

The presumption against extraterritoriality does not require us to adopt such a constricted interpretation. While the presumption can be overcome only by a clear indication of extraterritorial effect, an express statement of extraterritoriality is not essential. "Assuredly context can be consulted as well." *Morrison*, *supra*, at 265. Context is dispositive here. Congress has not expressly said that § 1962(c) applies to patterns of racketeering activity in foreign countries, but it has defined "racketeering activity"—and by extension a "pattern of racketeering activity"—to encompass violations of predicate statutes that *do* expressly apply extraterritorially. Short of an explicit declaration, it is hard to imagine how Congress could have more clearly indicated that it intended RICO to have (some) extraterritorial effect. This unique structure makes RICO the rare statute that clearly evidences extraterritorial effect despite lacking an express statement of extraterritoriality.

We therefore conclude that RICO applies to some foreign racketeering activity. A violation of § 1962 may be based on a pattern of racketeering that includes predicate offenses committed abroad, provided that each of those offenses violates a predicate statute that is itself extraterritorial. This fact is determinative as to §§ 1962(b) and (c), both of which prohibit the employment of a pattern of racketeering. Although they differ as to the end for which the pattern is employed—to acquire or maintain control of an enterprise under subsection (b), or to conduct an enterprise's affairs under subsection (c)—this difference is immaterial for extraterritoriality purposes.

Section 1962(a) presents a thornier question. Unlike subsections (b) and (c), subsection (a) targets certain uses of *income* derived from a pattern of racketeering, not the use of the pattern itself. Cf. *Anza* v. *Ideal Steel Supply Corp.*, 547 U. S. 451, 461–462 (2006). While we have no difficulty concluding that this prohibition applies to income derived from foreign patterns of racketeering (within the limits we have discussed), arguably § 1962(a) extends only to domestic uses of the income. The Second Circuit did not decide this question because it found that respondents have alleged "a domestic investment of racketeering proceeds in the form of RJR's merger in the United States with Brown & Williamson and investments in other U. S. operations." 764 F. 3d, at 138, n. 5. RJR does not dispute the basic soundness of the Second Circuit's reasoning, but it does contest the court's reading of the complaint. See Brief for Petitioners 57–58. Because the parties have not focused on this issue, and because it makes no difference to our resolution of this case, see *infra*, at 355, we assume without deciding that respondents have pleaded a domestic investment of racketeering income in violation of § 1962(a).

Finally, although respondents' complaint alleges a violation of RICO's conspiracy provision, § 1962(d), the parties' briefs do not address whether this provision should be treated differently from the provision (§ 1962(a), (b), or (c)) that a defendant allegedly conspired to violate. We therefore decline to reach this issue, and assume without deciding that § 1962(d)'s extraterritoriality tracks that of the provision underlying the alleged conspiracy.

B

RJR contends that, even if RICO may apply to foreign patterns of racketeering, the statute does not apply to foreign *enterprises*. Invoking *Morrison*'s discussion of the Exchange Act's "focus," RJR says that the "focus" of RICO is the enterprise being corrupted—not the pattern of racketeering—and that RICO's enterprise element gives no clear indication of extraterritorial effect. Accordingly, RJR reasons, RICO requires a domestic enterprise.

This argument misunderstands *Morrison*. As explained above, *supra*, at 337, only at the second step of the inquiry do we consider a statute's "focus." Here, however, there is a clear indication at step one that RICO applies extraterritorially. We therefore do not proceed to the "focus" step. The *Morrison* Court's discussion of the statutory "focus" made this clear, stating that "[i]f § 10(b) did apply abroad, we would not need to determine which transnational frauds it applied to; it would apply to all of them (barring some other limitation)." 561 U. S., at 267, n. 9. The same is true here. RICO—or at least §§ 1962(b) and (c)—applies abroad, and so we do not need to determine which transnational (or wholly foreign) patterns of racketeering it applies to; it applies to all of them, regardless of whether they are connected to a "foreign" or "domestic" enterprise. This rule is, of course, subject to the important limitation that RICO covers foreign predicate offenses only to the extent that the underlying predicate statutes are extraterritorial. But within those bounds, the location of the affected enterprise does not impose an independent constraint.

It is easy to see why Congress did not limit RICO to domestic enterprises. A domestic enterprise requirement would lead to difficult line-drawing problems and counterintuitive results. It would exclude from RICO's reach foreign enterprises—whether corporations, crime rings, other associations, or individuals—that operate within the United States. Imagine, for example, that a foreign corporation has operations in the United States and that one of the corporation's managers in the United States conducts its U. S. affairs through a pattern of extortion and mail fraud. Such domestic conduct would seem to fall well within what Congress meant to capture in enacting RICO. Congress, after all, does not usually exempt foreigners acting in the United

States from U. S. legal requirements. See 764 F. 3d, at 138 ("Surely the presumption against extraterritorial application of United States laws does not command giving foreigners carte blanche to violate the laws of the United States in the United States"). Yet RJR's theory would insulate this scheme from RICO liability—both civil and criminal—because the enterprise at issue is a foreign, not domestic, corporation.

Seeking to avoid this result, RJR offers that any " 'emissaries' " a foreign enterprise sends to the United States—such as our hypothetical U. S.-based corporate manager—could be carved off and considered a "distinct domestic enterprise" under an association-in-fact theory. Brief for Petitioners 40. RJR's willingness to gerrymander the enterprise to get around its proposed domestic enterprise requirement is telling. It suggests that RJR is not really concerned about whether an enterprise is foreign or domestic, but whether the relevant conduct occurred here or abroad. And if that is the concern, then it is the pattern of racketeering activity that matters, not the enterprise. Even spotting RJR its "domestic emissary" theory, this approach would lead to strange gaps in RICO's coverage. If a foreign enterprise sent only a single "emissary" to engage in racketeering in the United States, there could be no RICO liability because a single person cannot be both the RICO enterprise and the RICO defendant. *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U. S. 158, 162 (2001).

RJR also offers no satisfactory way of determining whether an enterprise is foreign or domestic. Like the District Court, RJR maintains that courts can apply the "nerve center" test that we use to determine a corporation's principal place of business for purposes of federal diversity jurisdiction. See *Hertz Corp.* v. *Friend*, 559 U. S. 77 (2010); 28 U. S. C. § 1332(c)(1); 2011 WL 843957, *5–*6. But this test quickly becomes meaningless if, as RJR suggests, a corporation with a foreign nerve center can, if necessary, be pruned into an association-in-fact enterprise with a domestic nerve center. The nerve center test, developed with ordinary corporate command structures in mind, is also ill suited to govern RICO association-in-fact enterprises, which "need not have a hierarchical structure or a 'chain of command.'" *Boyle* v. *United States*, 556 U. S. 938, 948 (2009). These difficulties are largely avoided if, as we conclude today, RICO's extraterritorial effect is pegged to the extraterritoriality judgments Congress has made in the predicate statutes, often by providing precise instructions as to when those statutes apply to foreign conduct.

The practical problems we have identified with RJR's proposed domestic enterprise requirement are not, by themselves, cause to reject it. Our point in reciting these troubling consequences of RJR's theory is simply to reinforce our conclusion, based on RICO's text and context, that Congress intended the prohibitions in 18 U. S. C. §§ 1962(b) and (c) to apply extraterritorially in tandem with the underlying predicates, without regard to the locus of the enterprise.

Although we find that RICO imposes no domestic enterprise requirement, this does not mean that every foreign enterprise will qualify. Each of RICO's substantive prohibitions requires proof of an enterprise that is "engaged in, or the activities of which affect, interstate or foreign commerce." §§ 1962(a), (b), (c). We do not take this reference to "foreign commerce" to mean literally all commerce occurring abroad. Rather, a RICO enterprise must engage in, or affect in some significant way, commerce directly involving the United States—*e. g.,* commerce between the United States and a foreign country. Enterprises whose activities lack that anchor to U. S. commerce cannot sustain a RICO violation.

C

Applying these principles, we agree with the Second Circuit that the complaint does not allege impermissibly extraterritorial violations of §§ 1962(b) and (c).[7]

[7] As to §§ 1962(a) and (d), see *supra,* at 341.

The alleged pattern of racketeering activity consists of five basic predicates: (1) money laundering, (2) material support of foreign terrorist organizations, (3) mail fraud, (4) wire fraud, and (5) violations of the Travel Act. The Second Circuit observed that the relevant provisions of the money laundering and material support of terrorism statutes expressly provide for extraterritorial application in certain circumstances, and it concluded that those circumstances are alleged to be present here. 764 F. 3d, at 139–140. The court found that the fraud statutes and the Travel Act do not contain the clear indication needed to overcome the presumption against extraterritoriality. But it held that the complaint alleges *domestic* violations of those statutes because it "allege[s] conduct in the United States that satisfies every essential element of the mail fraud, wire fraud, and Travel Act claims." *Id.*, at 142.

RJR does not dispute these characterizations of the alleged predicates. We therefore assume without deciding that the alleged pattern of racketeering activity consists entirely of predicate offenses that were either committed in the United States or committed in a foreign country in violation of a predicate statute that applies extraterritorially. The alleged enterprise also has a sufficient tie to U. S. commerce, as its members include U. S. companies, and its activities depend on sales of RJR's cigarettes conducted through "the U. S. mails and wires," among other things. App. to Pet. for Cert. 186a, Complaint ¶96. On these premises, respondents' allegations that RJR violated §§ 1962(b) and (c) do not involve an impermissibly extraterritorial application of RICO.[8]

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[8] We stress that we are addressing only the extraterritoriality question. We have not been asked to decide, and therefore do not decide, whether the complaint satisfies any other requirements of RICO, or whether the complaint in fact makes out violations of the relevant predicate statutes.

IV

We now turn to RICO's private right of action, on which respondents' lawsuit rests. Section 1964(c) allows "[a]ny person injured in his business or property by reason of a violation of section 1962" to sue for treble damages, costs, and attorney's fees. Irrespective of any extraterritorial application of § 1962, we conclude that § 1964(c) does not overcome the presumption against extraterritoriality. A private RICO plaintiff therefore must allege and prove a *domestic* injury to its business or property.

A

The Second Circuit thought that the presumption against extraterritoriality did not apply to § 1964(c) independently of its application to § 1962, reasoning that the presumption "is primarily concerned with the question of what *conduct* falls within a statute's purview." 764 F. 3d, at 151. We rejected that view in *Kiobel*, holding that the presumption "constrain[s] courts considering causes of action" under the ATS, a " 'strictly jurisdictional' " statute that "does not directly regulate conduct or afford relief." 569 U. S., at 116. We reached this conclusion even though the underlying substantive law consisted of well-established norms of international law, which by definition apply beyond this country's borders. See *id.*, at 116–118.

The same logic requires that we separately apply the presumption against extraterritoriality to RICO's cause of action despite our conclusion that the presumption has been overcome with respect to RICO's substantive prohibitions. "The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion." *Sosa* v. *Alvarez-Machain*, 542 U. S. 692, 727 (2004). Thus, as we have observed in other contexts, providing a private civil remedy for foreign conduct creates a potential for international friction beyond that presented by merely applying U. S. substantive law to that foreign conduct. See, *e. g.*, *Kiobel*, *supra*, at 117 ("Each of th[e] decisions" involved in defining a cause of action based on "conduct within the territory of another sovereign" "carries with it significant foreign policy implications").

Consider antitrust. In that context, we have observed that "[t]he application . . . of American private treble-damages remedies to anticompetitive conduct taking place abroad has generated considerable controversy" in other nations, even when those nations agree with U. S. substantive law on such things as banning price fixing. *F. Hoffmann-La Roche Ltd* v. *Empagran S. A.*, 542 U. S. 155, 167 (2004). Numerous foreign countries—including some respondents in this case—advised us in *Empagran* that "to apply [U. S.] remedies would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody." *Ibid.*[9]

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[9] See Brief for Government of Federal Republic of Germany et al. as *Amici Curiae*, O. T. 2003, No. 03–724, p. 11 (identifying "controversial features of the U. S. legal system," including treble damages, extensive discovery, jury trials, class actions, contingency fees, and punitive damages); *id.*, at 15 ("Private plaintiffs rarely exercise the type of self-restraint or demonstrate the requisite sensitivity to the concerns of foreign governments that mark actions brought by the United States government"); Brief for United Kingdom et al. as *Amici Curiae*, O. T. 2003, No. 03–724, p. 13 ("No other country has adopted the United States' unique 'bounty hunter' approach that permits a private plaintiff to 'recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.' . . . Expanding the jurisdiction of this generous United States private claim system could skew enforcement and increase international business risks. It makes United States courts the forum of choice without regard to whose laws are applied, where the injuries occurred or even if there is any connection to the court except the ability to get *in personam* jurisdiction over the defendants"); see also Brief for Government of Canada as *Amicus Curiae*, O. T. 2003, No. 03–724, p. 14 ("[T]he attractiveness of the [U. S.] treble damages remedy would supersede the

We received similar warnings in *Morrison*, where France, a respondent here, informed us that "most foreign countries proscribe securities fraud" but "have made very different choices with respect to the best way to implement that proscription," such as "prefer[ring] 'state actions, not private ones' for the enforcement of law." Brief for Republic of France as *Amicus Curiae*, O. T. 2009, No. 08–1191, p. 20; see *id.*, at 23 ("Even when foreign countries permit private rights of action for securities fraud, they often have different schemes" for litigating them and "may approve of different measures of damages"). Allowing foreign investors to pursue private suits in the United States, we were told, "would upset that delicate balance and offend the sovereign interests of foreign nations." *Id.*, at 26.

Allowing recovery for foreign injuries in a civil RICO action, including treble damages, presents the same danger of international friction. See Brief for United States as *Amicus Curiae* 31–34. This is not to say that friction would necessarily result in every case, or that Congress would violate international law by permitting such suits. It is to say only that there is a potential for international controversy that militates against recognizing foreign-injury claims without clear direction from Congress. Although "a risk of conflict between the American statute and a foreign law" is not a prerequisite for applying the presumption against extraterritoriality, *Morrison*, 561 U. S., at 255, where such a risk is evident, the need to enforce the presumption is at its apex.

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national policy decision by Canada that civil recovery by Canadian citizens for injuries resulting from anti-competitive behavior in Canada should be limited to actual damages"). *Empagran* concerned not the presumption against extraterritoriality *per se*, but the related rule that we construe statutes to avoid unreasonable interference with other nations' sovereign authority where possible. See *F. Hoffmann-La Roche Ltd* v. *Empagran S. A.*, 542 U. S. 155, 164 (2004); see also *Hartford Fire Ins. Co.* v. *California*, 509 U. S. 764, 814–815 (1993) (Scalia, J., dissenting) (discussing the two canons). As the foregoing discussion makes clear, considerations relevant to one rule are often relevant to the other.

Respondents urge that concerns about international friction are inapplicable in this case because here the plaintiffs are not foreign citizens seeking to bypass their home countries' less generous remedies but rather the foreign countries themselves. Brief for Respondents 52–53. Respondents assure us that they "are satisfied that the[ir] complaint . . . comports with limitations on prescriptive jurisdiction under international law and respects the dignity of foreign sovereigns." *Ibid.* Even assuming that this is true, however, our interpretation of § 1964(c)'s injury requirement will necessarily govern suits by nongovernmental plaintiffs that are not so sensitive to foreign sovereigns' dignity. We reject the notion that we should forgo the presumption against extraterritoriality and instead permit extraterritorial suits based on a case-by-case inquiry that turns on or looks to the consent of the affected sovereign. See *Morrison*, *supra*, at 261 ("Rather than guess anew in each case, we apply the presumption in all cases"); cf. *Empagran*, *supra*, at 168. Respondents suggest that we should be reluctant to permit a foreign corporation to be sued in the courts of this country for events occurring abroad if the nation of incorporation objects, but that we should discard those reservations when a foreign state sues a U. S. entity in this country under U. S. law—instead of in its own courts and under its own laws—for conduct committed on its own soil. We refuse to adopt this double standard. "After all, in the law, what is sauce for the goose is normally sauce for the gander." *Heffernan* v. *City of Paterson*, 578 U. S. 266, 272 (2016).

B

Nothing in § 1964(c) provides a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States. The statute provides a cause of action to "[a]ny person injured in his business or property" by a violation of § 1962. § 1964(c). The word "any" ordinarily connotes breadth, but it is insufficient to displace the presumption against extraterritoriality. See *Kiobel*, 569 U. S., at 118. The statute's reference to injury to "business or property" also does not indicate extraterritorial application. If anything, by cabining RICO's private cause of action to particular kinds of injury—excluding, for example, personal injuries—Congress signaled that the civil remedy is not coextensive with § 1962's substantive prohibitions. The rest of § 1964(c) places a limit on RICO plaintiffs' ability to rely on securities fraud to make out a claim. This too suggests that § 1964(c) is narrower in its application than § 1962, and in any event does not support extraterritoriality.

The Second Circuit did not identify anything in § 1964(c) that shows that the statute reaches foreign injuries. Instead, the court reasoned that § 1964(c)'s extraterritorial effect flows directly from that of § 1962. Citing our holding in *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479 (1985), that the "compensable injury" addressed by § 1964(c) "necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern," *id.*, at 497, the Court of Appeals held that a RICO plaintiff may sue for foreign injury that was caused by the violation of a predicate statute that applies extraterritorially, just as a substantive RICO violation may be based on extraterritorial predicates. 764 F. 3d, at 151. JUSTICE GINSBURG advances the same theory. See *post*, at 358–359 (opinion concurring in part, dissenting in part, and dissenting from judgment). This reasoning has surface appeal, but it fails to appreciate that the presumption against extraterritoriality must be applied separately to both RICO's substantive prohibitions and its private right of action. See *supra*, at 346–349 and this page. It is not enough to say that a private right of action must reach abroad because the underlying law governs conduct in foreign countries. Something more is needed, and here it is absent.[10]

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[10] Respondents note that *Sedima* itself involved an injury suffered by a Belgian corporation in Belgium. Brief for Respondents 45–46; see *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 483–484 (1985). Respondents

Respondents contend that background legal principles allow them to sue for foreign injuries, invoking what they call the " 'traditional rule' that 'a plaintiff injured in a foreign country' could bring suit 'in American courts.' " Brief for Respondents 41 (quoting *Sosa*, 542 U. S., at 706–707). But the rule respondents invoke actually provides that a court will ordinarily "apply *foreign* law to determine the tortfeasor's liability" to "a plaintiff injured in a foreign country." *Id.*, at 706 (emphasis added). Respondents' argument might have force if they sought to sue RJR for violations of *their own laws* and to invoke federal diversity jurisdiction as a basis for proceeding in U. S. courts. See U. S. Const., Art. III, § 2, cl. 1 ("The judicial Power [of the United States] shall extend . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States"); 28 U. S. C. § 1332(a)(4) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 . . . and is between . . . a foreign state . . . as plaintiff and citizens of a State or of different States"). The question here, however, is not "whether a federal court has jurisdiction to entertain a cause of action provided by foreign or even international law. The question is instead whether the court has authority to recognize a cause of action *under U. S. law*" for injury suffered overseas. *Kiobel*, *supra*, at 119 (emphasis added). As to that question, the relevant background principle is the presumption against extraterritoriality, not the "traditional rule" respondents cite.

Respondents and JUSTICE GINSBURG point out that RICO's private right of action was modeled after § 4 of the Clayton Act, 15 U. S. C. § 15; see *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 267–268 (1992), which we have held allows recovery for injuries suffered abroad as a result of antitrust violations, see *Pfizer Inc.* v.

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correctly do not contend that this fact is controlling here, as the *Sedima* Court did not address the foreign-injury issue.

Government of India, 434 U. S. 308, 314–315 (1978). It follows, respondents and JUSTICE GINSBURG contend, that § 1964(c) likewise allows plaintiffs to sue for injuries suffered in foreign countries. We disagree. Although we have often looked to the Clayton Act for guidance in construing § 1964(c), we have not treated the two statutes as interchangeable. We have declined to transplant features of the Clayton Act's cause of action into the RICO context where doing so would be inappropriate. For example, in *Sedima* we held that a RICO plaintiff need not allege a special "racketeering injury," rejecting a requirement that some lower courts had adopted by "[a]nalog[y]" to the "antitrust injury" required under the Clayton Act. 473 U. S., at 485, 495.

There is good reason not to interpret § 1964(c) to cover foreign injuries just because the Clayton Act does so. When we held in *Pfizer* that the Clayton Act allows recovery for foreign injuries, we relied first and foremost on the fact that the Clayton Act's definition of "person"—which in turn defines who may sue under that Act—"explicitly includes 'corporations and associations existing under or authorized by . . . the laws of any foreign country.'" 434 U. S., at 313; see 15 U. S. C. § 12.[11] RICO lacks the language that the *Pfizer*

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[11] *Pfizer* most directly concerned whether a foreign government is a "person" that may be a Clayton Act plaintiff. But it is clear that the Court's decision more broadly concerned recovery for foreign injuries, see 434 U. S., at 315 (expressing concern that "persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home"), as respondents themselves contend, see Brief for Respondents 44 ("[T]his Court clearly recognized in *Pfizer* that Section 4 extends to foreign injuries"). The Court also permitted an antitrust plaintiff to sue for foreign injuries in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690 (1962), but the Court's discussion in that case focused on the extraterritoriality of the underlying antitrust prohibitions, not the Clayton Act's private right of action, see *id.*, at 704–705, and so sheds little light on the interpretive question now before us.

Court found critical. See 18 U. S. C. § 1961(3).[12] To the extent that the *Pfizer* Court cited other factors that might apply to § 1964(c), they were not sufficient in themselves to show that the provision has extraterritorial effect. For example, the *Pfizer* Court, writing before we honed our extraterritoriality jurisprudence in *Morrison* and *Kiobel*, reasoned that Congress "[c]learly . . . did not intend to make the [Clayton Act's] treble-damages remedy available only to consumers in our own country" because "the antitrust laws extend to trade 'with foreign nations' as well as among the several States of the Union." 434 U. S., at 313–314. But we have emphatically rejected reliance on such language, holding that " 'even statutes . . . that expressly refer to "*foreign* commerce" do not apply abroad.' " *Morrison*, 561 U. S., at 262–263. This reasoning also fails to distinguish between extending *substantive antitrust law* to foreign conduct and extending a *private right of action* to foreign injuries, two separate issues that, as we have explained, raise distinct extraterritoriality problems. See *supra*, at 346–350. Finally, the *Pfizer* Court expressed concern that it would "defeat th[e] purposes" of the antitrust laws if a defendant could "escape full liability for his illegal actions." 434 U. S., at 314. But this justification was merely an attempt to "divin[e] what Congress would have wanted" had it considered the question of extraterritoriality—an approach we eschewed in *Morrison*. 561 U. S., at 261. Given all this, and in particular the fact that RICO lacks the language that *Pfizer* found integral to its decision, we decline to extend this aspect of our Clayton Act jurisprudence to RICO's cause of action.

Underscoring our reluctance to read § 1964(c) as broadly as we have read the Clayton Act is Congress's more recent

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[12] This does not mean that foreign plaintiffs may not sue under RICO. The point is that RICO does not include the explicit foreign-oriented language that the *Pfizer* Court found to support foreign-injury suits under the Clayton Act.

decision to define precisely the antitrust laws' extraterritorial effect and to exclude from their reach most conduct that "causes only foreign injury." *Empagran*, 542 U. S., at 158 (describing Foreign Trade Antitrust Improvements Act of 1982); see also *id.*, at 169–171, 173–174 (discussing how the applicability of the antitrust laws to foreign injuries may depend on whether suit is brought by the Government or by private plaintiffs). Although this later enactment obviously does not limit § 1964(c)'s scope by its own force, it does counsel against importing into RICO those Clayton Act principles that are at odds with our current extraterritoriality doctrine.

C

Section 1964(c) requires a civil RICO plaintiff to allege and prove a domestic injury to business or property and does not allow recovery for foreign injuries. The application of this rule in any given case will not always be self-evident, as disputes may arise as to whether a particular alleged injury is "foreign" or "domestic." But we need not concern ourselves with that question in this case. As this case was being briefed before this Court, respondents filed a stipulation in the District Court waiving their damages claims for domestic injuries. The District Court accepted this waiver and dismissed those claims with prejudice. Respondents' remaining RICO damages claims therefore rest entirely on injury suffered abroad and must be dismissed.[13]

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[13] In respondents' letter notifying this Court of the waiver of their domestic-injury damages claims, respondents state that "[n]othing in the stipulation will affect respondents' claims for equitable relief, including claims for equitable relief under state common law that are not at issue in this case before this Court." Letter from David C. Frederick, Counsel for Respondents, to Scott S. Harris, Clerk of Court (Feb. 29, 2016). Although the letter mentions only state-law claims for equitable relief, count 5 of respondents' complaint seeks equitable relief under RICO. App. to Pet. for Cert. 260a–262a, Complaint ¶¶181–188. This Court has never decided whether equitable relief is available to private RICO plaintiffs, the parties have not litigated that question here, and we express no opinion

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The judgment of the United States Court of Appeals for the Second Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE SOTOMAYOR took no part in the consideration or decision of this case.

JUSTICE GINSBURG, with whom JUSTICE BREYER and JUSTICE KAGAN join, concurring in Parts I, II, and III, and dissenting from Part IV and from the judgment.

In enacting the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. § 1961 *et seq.*, Congress sought to provide a new tool to combat "organized crime and its economic roots." *Russello* v. *United States*, 464 U. S. 16, 26 (1983). RICO accordingly proscribes various ways in which an "enterprise," § 1961(4), might be controlled, operated, or funded by a "pattern of racketeering activity," § 1961(1), (5). See § 1962.[1] RICO builds on predicate statutes, many of them applicable extraterritorially. App. to

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on the issue today. We note, however, that any claim for equitable relief under RICO based on foreign injuries is necessarily foreclosed by our holding that § 1964(c)'s cause of action requires a domestic injury to business or property. It is unclear whether respondents intend to seek equitable relief under RICO based on domestic injuries, and it may prove unnecessary to decide whether § 1964(c) (or respondents' stipulation) permits such relief in light of respondents' state-law claims. We leave it to the lower courts to determine, if necessary, the status and availability of any such claims.

[1] The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. § 1961 *et seq.*, makes it unlawful "to . . . invest" in an enterprise income derived from a pattern of racketeering activity, § 1962(a), "to acquire or maintain" an interest in an enterprise through a pattern of racketeering activity, § 1962(b), "to conduct or participate . . . in the conduct" of an enterprise through a pattern of racketeering activity, § 1962(c), or "to conspire" to violate any of those provisions, § 1962(d).

Brief for United States as *Amicus Curiae* 27a–33a. Congress not only armed the United States with authority to initiate criminal and civil proceedings to enforce RICO, §§ 1963, 1964(b), Congress also created in § 1964(c) a private right of action for "[a]ny person injured in his business or property by reason of a violation of [RICO's substantive provision]."

Invoking this right, respondents, the European Community and 26 member states, filed suit against petitioners, RJR Nabisco, Inc., and related entities. Alleging that petitioners orchestrated from their U. S. headquarters a complex money-laundering scheme in violation of RICO, respondents sought to recover for various injuries, including losses sustained by financial institutions and lost opportunities to collect duties. See *ante*, at 332–335. Denying respondents a remedy under RICO, the Court today reads into § 1964(c) a domestic-injury requirement for suits by private plaintiffs nowhere indicated in the statute's text. Correctly, the Court imposes no such restriction on the United States when it initiates a civil suit under § 1964(b). Unsupported by RICO's text, inconsistent with its purposes, and unnecessary to protect the comity interests the Court emphasizes, the domestic-injury requirement for private suits replaces Congress' prescription with one of the Court's own invention. Because the Court has no authority so to amend RICO, I dissent.

I

As the Court recounts, *ante*, at 335, "Congress ordinarily legislates with respect to domestic, not foreign, matters." *Morrison* v. *National Australia Bank Ltd.*, 561 U. S. 247, 255 (2010). So recognizing, the Court employs a presumption that " 'legislation . . . is meant to apply only within the territorial jurisdiction of the United States.' " *Ibid.* (quoting *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 248 (1991) (*Aramco*)). But when a statute demonstrates Congress' "affirmative inten[t]" that the law should apply beyond the borders of the United States, as numerous RICO predicate statutes do, the presumption is rebutted, and the law applies extraterritorially to the extent Congress prescribed. See *Morrison*, 561 U. S., at 255 (quoting *Aramco*, 499 U. S., at 248). The presumption, in short, aims to distinguish instances in which Congress consciously designed a statute to reach beyond U. S. borders, from those in which nothing plainly signals that Congress directed extraterritorial application.

In this case, the Court properly holds that Congress signaled its "affirmative inten[t]," *Morrison*, 561 U. S., at 255, that RICO, in many instances, should apply extraterritorially. See *ante*, at 338–345; App. to Brief for United States as *Amicus Curiae* 27a–33a. As the Court relates, see *ante*, at 338–341, Congress deliberately included within RICO's compass predicate federal offenses that manifestly reach conduct occurring abroad. See, *e. g.*, §§ 1956–1957 (money laundering); § 2339B (material support to foreign terrorist organizations). Accordingly, the Court concludes, when the predicate crimes underlying invocation of § 1962 thrust extraterritorially, so too does § 1962. I agree with that conclusion.

I disagree, however, that the private right of action authorized by § 1964(c) requires a domestic injury to a person's business or property and does not allow recovery for foreign injuries. One cannot extract such a limitation from the text of § 1964(c), which affords a right of action to "[a]ny person injured in his business or property by reason of a violation of section 1962." Section 1962, at least subsections (b) and (c), all agree, encompasses foreign injuries. How can § 1964(c) exclude them when, by its express terms, § 1964(c) is triggered by "a violation of section 1962"? To the extent RICO reaches injury abroad when the Government is the suitor pursuant to § 1962 (specifying prohibited activities) and § 1963 (criminal penalties) or § 1964(b) (civil remedies), to that same extent, I would hold, RICO reaches extraterritorial injury when, pursuant to § 1964(c), the suitor is a private plaintiff.

II

A

I would not distinguish, as the Court does, between the extraterritorial compass of a private right of action and that of the underlying proscribed conduct. See *ante*, at 346–349, 350, 353. Instead, I would adhere to precedent addressing RICO, linking, not separating, prohibited activities and authorized remedies. See *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 495 (1985) ("If the defendant engages in a pattern of racketeering activity in a manner forbidden by [§ 1962], and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c)."); *ibid.* (refusing to require a "distinct 'racketeering injury' " for private RICO actions under § 1964(c) where § 1962 imposes no such requirement).[2]

To reiterate, a § 1964(c) right of action may be maintained by "[a]ny person injured in his business or property by reason of a violation of *section 1962*." (Emphasis added.) "[I]ncorporating one statute . . . into another," the Court has long understood, "serves to bring into the latter all that is fairly covered by the reference." *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 392 (1924). RICO's private right of action, it cannot be gainsaid, expressly incorporates § 1962,

[2] Insisting that the presumption against extraterritoriality should "apply to § 1964(c) independently of its application to § 1962," *ante*, at 346, the Court cites *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U. S. 108 (2013). That decision will not bear the weight the Court would place on it. As the Court comprehends, the statute there at issue, the Alien Tort Statute, 28 U. S. C. § 1350, is a spare jurisdictional grant that itself does not "regulate conduct or afford relief." *Kiobel*, 569 U. S., at 116. With no grounding for extraterritorial application in the statute, *Kiobel* held, courts have no warrant to fashion, on their own initiative, claims for relief that operate extraterritorially. See *ibid.* ("[T]he question is not what Congress has done but instead what courts may do.").

whose extraterritoriality, the Court recognizes, is coextensive with the underlying predicate offenses charged. See *ante,* at 338–345. See also *ante,* at 340 ("[I]t is hard to imagine how Congress could have more clearly indicated that it intended RICO to have (some) extraterritorial effect."). The sole additional condition § 1964(c) imposes on access to relief is an injury to one's "business or property." Nothing in that condition should change the extraterritoriality assessment. In agreement with the Second Circuit, I would hold that "[i]f an injury abroad was proximately caused by the violation of a statute which Congress intended should apply to injurious conduct performed abroad, [there is] no reason to import a domestic injury requirement simply because the victim sought redress through the RICO statute." 764 F. 3d 149, 151 (2014).

What § 1964(c)'s text conveys is confirmed by its history. As this Court has repeatedly observed, Congress modeled § 1964(c) on § 4 of the Clayton Act, 15 U. S. C. § 15, the private civil-action provision of the federal antitrust laws, which employs nearly identical language: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor." See *Klehr* v. *A. O. Smith Corp.*, 521 U. S. 179, 189–190 (1997); *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 267–268 (1992); *Sedima*, 473 U. S., at 485, 489. Clayton Act § 4, the Court has held, provides a remedy for injuries both foreign and domestic. *Pfizer Inc.* v. *Government of India*, 434 U. S. 308, 313–314 (1978) ("Congress did not intend to make the [Clayton Act's] treble-damages remedy available only to consumers in our own country."); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 707–708 (1962) (allowing recovery in Clayton Act § 4 suit for injuries in Canada).

"The similarity of language in [the two statutes] is, of course, a strong indication that [they] should be interpreted *pari passu*," *Northcross* v. *Board of Ed. of Memphis City*

Schools, 412 U. S. 427, 428 (1973) (*per curiam*), and I see no contradictory indication here.[3] Indeed, when the Court has addressed gaps in § 1964(c), it has aligned the RICO private right of action with the private right afforded by Clayton Act § 4. See, *e. g., Klehr*, 521 U. S., at 188–189 (adopting for private RICO actions Clayton Act § 4's accrual rule—that a claim accrues when a defendant commits an act that injures a plaintiff's business—rather than criminal RICO's "most recent, predicate act" rule); *Holmes*, 503 U. S., at 268 (requiring private plaintiffs under § 1964(c), like private plaintiffs under Clayton Act § 4, to show proximate cause); *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U. S. 143, 155–156 (1987) (applying to § 1964(c) actions Clayton Act § 4's shorter statute of limitations instead of "catchall" federal statute of limitations applicable to RICO criminal prosecutions).

This very case illustrates why pinning a domestic-injury requirement onto § 1964(c) makes little sense. All defendants are U. S. corporations, headquartered in the United States, charged with a pattern of racketeering activity directed and managed from the United States, involving con-

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[3] The Court asserts that "[t]here is good reason not to interpret § 1964(c) to cover foreign injuries just because the Clayton Act does." *Ante,* at 352. The Clayton Act's definition of "person," 15 U. S. C. § 12, the Court observes, "explicitly includes 'corporations and associations existing under or authorized by . . . the laws of any foreign country.' " *Ante,* at 352 (some internal quotation marks omitted). RICO, the Court stresses, lacks this "critical" language. *Ante,* at 353. The Court's point is underwhelming. RICO's definition of "persons" is hardly confining: "any individual or entity capable of holding a legal or beneficial interest in property." 18 U. S. C. § 1961(3). Moreover, there is little doubt that Congress anticipated § 1964(c) plaintiffs like the suitors here. See 147 Cong. Rec. 20676, 20710 (2001) (remarks of Sen. Kerry) ("Since some of the money-laundering conducted in the world today also defrauds foreign governments, it would be hostile to the intent of [the USA PATRIOT Act, which added as RICO predicates additional money-laundering offenses,] for us to interject into the statute any rule of construction of legislative language which would in any way limit our foreign allies access to our courts to battle against money laundering.").

duct occurring in the United States. In particular, according to the complaint, defendants received in the United States funds known to them to have been generated by illegal narcotics trafficking and terrorist activity, conduct violative of § 1956(a)(2); traveled using the facilities of interstate commerce in furtherance of unlawful activity, in violation of § 1952; provided material support to foreign terrorist organizations "in the United States and elsewhere," in violation of § 2339B; and used U. S. mails and wires in furtherance of a "scheme or artifice to defraud," in violation of §§ 1341 and 1343. App. to Pet. for Cert. 238a–250a. In short, this case has the United States written all over it.

B

The Court nevertheless deems a domestic-injury requirement for private RICO plaintiffs necessary to avoid international friction. See *ante*, at 347–350. When the United States considers whether to initiate a prosecution or civil suit, the Court observes, it will take foreign-policy considerations into account, but private parties will not. It is far from clear, however, that the Court's blanket rule would ordinarily work to ward off international discord. Invoking the presumption against extraterritoriality as a bar to *any* private suit for injuries to business or property abroad, this case suggests, might spark, rather than quell, international strife. Making such litigation available to domestic but not foreign plaintiffs is hardly solicitous of international comity or respectful of foreign interests. Cf. *Pfizer*, 434 U. S., at 318–319 ("[A] foreign nation is generally entitled to prosecute any civil claim in the courts of the United States upon the same basis as a domestic corporation or individual might do. To deny him this privilege would manifest a want of comity and friendly feeling." (internal quotation marks omitted)).

RICO's definitional provisions exclude "[e]ntirely foreign activity." 783 F. 3d 123, 143 (Lynch, J., dissenting from denial of rehearing en banc). Thus no suit under RICO would lie for injuries resulting from "[a] pattern of murders of Italian citizens committed by members of an Italian organized crime group in Italy." *Ibid.* That is so because "murder is a RICO predicate only when it is 'chargeable under state law' or indictable under specific federal statutes." *Ibid.* (citing § 1961(1)(A), (G)).

To the extent extraterritorial application of RICO could give rise to comity concerns not present in this case, those concerns can be met through doctrines that serve to block litigation in U. S. courts of cases more appropriately brought elsewhere. Where an alternative, more appropriate forum is available, the doctrine of *forum non conveniens* enables U. S. courts to refuse jurisdiction. See *Piper Aircraft Co.* v. *Reyno*, 454 U. S. 235 (1981) (dismissing wrongful-death action arising out of air crash in Scotland involving only Scottish victims); Restatement (Second) of Conflict of Laws § 84 (1969). Due process constraints on the exercise of general personal jurisdiction shelter foreign corporations from suit in the United States based on conduct abroad unless the corporation's "affiliations with the [forum] in which suit is brought are so constant and pervasive 'as to render it essentially at home [there].'" *Daimler AG* v. *Bauman*, 571 U. S. 117, 122 (2014) (quoting *Goodyear Dunlop Tires Operations, S. A.* v. *Brown*, 564 U. S. 915, 919 (2011); alterations omitted). These controls provide a check against civil RICO litigation with little or no connection to the United States.

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The Court hems in RICO out of concern about establishing a "double standard." *Ante*, at 349. But today's decision does exactly that. U. S. defendants commercially engaged here and abroad would be answerable civilly to U. S. victims of their criminal activities, but foreign parties similarly injured would have no RICO remedy. "'Sauce for the goose'" should indeed serve the gander as well. See *ibid.* (quoting

Heffernan v. *City of Paterson*, 578 U. S. 266, 272 (2016)). I would resist reading into § 1964(c) a domestic-injury requirement Congress did not prescribe. Instead, I would affirm the Second Circuit's sound judgment:

> "To establish a compensable injury under § 1964(c), a private plaintiff must show that (1) the defendant 'engage[d] in a pattern of racketeering activity in a manner forbidden by' § 1962, and (2) that these 'racketeering activities' were the proximate cause of some injury to the plaintiff's business or property." 764 F. 3d, at 151 (quoting *Sedima*, 473 U. S., at 495; *Holmes*, 503 U. S., at 268).

Because the Court overturns that judgment, I dissent from Part IV of the Court's opinion and from the judgment.

JUSTICE BREYER, concurring in part, dissenting in part, and dissenting from the judgment.

I join Parts I through III of the Court's opinion. But I do not join Part IV. The Court there holds that the private right of action provision in the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. § 1964(c), has no extraterritorial application. Like JUSTICE GINSBURG, I believe that it does.

In saying this, I note that this case does not involve the kind of purely foreign facts that create what we have sometimes called "foreign-cubed" litigation (*i. e.*, cases where the plaintiffs are foreign, the defendants are foreign, and all the relevant conduct occurred abroad). See, *e. g.*, *Morrison* v. *National Australia Bank Ltd.*, 561 U. S. 247, 283, n. 11 (2010) (Stevens, J., concurring in judgment). Rather, it has been argued that the statute at issue does not extend to such a case. See 18 U. S. C. § 1961(1) (limiting qualifying RICO predicates to those that are, *e. g.*, "chargeable" under state law, or "indictable" or "punishable" under federal law); Tr. of Oral Arg. 32, 33–34 (respondents conceding that all of the relevant RICO predicates require some kind of connection to the United States). And, as JUSTICE GINSBURG points out, "this case has the United States written all over it." *Ante,* at 361 (opinion concurring in part, dissenting in part, and dissenting from judgment).

Unlike the Court, I cannot accept as controlling the Government's argument as *amicus curiae* that "[a]llowing recovery for foreign injuries in a civil RICO action . . . presents the . . . danger of international friction." *Ante,* at 348. The Government does not provide examples, nor apparently has it consulted with foreign governments on the matter. See Tr. of Oral Arg. 26 ("[T]o my knowledge, [the Government] didn't have those consultations" with foreign states concerning this case). By way of contrast, the European Community and 26 of its member states tell us "that the complaint in this case, which alleges that American corporations engaged in a pattern of predominantly domestic racketeering activity that caused injury to respondents' businesses and property, comports with limitations on prescriptive jurisdiction under international law and respects the dignity of foreign sovereigns." Brief for Respondents 52–53; see also Tr. of Oral Arg. 31 (calling the European Union's "vett[ing] exercise" concerning this case "comprehensiv[e]"). In these circumstances, and for the reasons given by JUSTICE GINSBURG, see *ante,* at 361–362, I would not place controlling weight on the Government's contrary view.

Consequently, I join JUSTICE GINSBURG's opinion.

REPORTER'S NOTE

The next page is purposely numbered 901. The numbers between 364 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR JUNE 13 THROUGH JUNE 20, 2016

June 13, 2016

Certiorari Dismissed

No. 15–8914. Malloy *v.* Peters et al. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 617 Fed. Appx. 948.

No. 15–9008. Presley *v.* Mississippi. Sup. Ct. Miss. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 15–9210. Escobar de Jesus *v.* United States. C. A. 1st Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*). Justice Kagan took no part in the consideration or decision of this motion and this petition.

Miscellaneous Orders

No. 15A1125. Weatherly *v.* United States. Application for certificate of appealability, addressed to Justice Ginsburg and referred to the Court, denied.

No. 15M126. Stone *v.* Reyes et al. Motion for leave to proceed as a veteran denied.

No. 15M127. Banks *v.* ACS Education et al.;
No. 15M128. Edwards *v.* Jones, Secretary, Florida Department of Corrections, et al.; and

No. 15M129. Dickerson *v.* Cartledge, Warden. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 15M130. H. M. *v.* Pennsylvania Department of Human Services, fka Pennsylvania Department of Public Welfare. Motion for leave to file petition for writ of certiorari with supplemental appendix under seal granted.

No. 15–8161. Sneed *v.* Florida. Dist. Ct. App. Fla., 3d Dist. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [578 U. S. 918] denied.

No. 15–8864. Campbell *v.* Anderson et al. C. A. 4th Cir.;
No. 15–8950. Holmes *v.* East Cooper Community Hospital, Inc., et al. Sup. Ct. S. C.;
No. 15–9017. Shaffer *v.* City of South Charleston, West Virginia, et al. Sup. Ct. App. W. Va.; and
No. 15–9313. Calkins *v.* United States. C. A. 8th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 5, 2016, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 15–1407. In re Anuforo; and
No. 15–9277. In re Madison. Petitions for writs of habeas corpus denied.

No. 15–8897. In re Morris. Petition for writ of mandamus denied.

Certiorari Denied

No. 15–944. DiMare Fresh, Inc., et al. *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 808 F. 3d 1301.

No. 15–966. Sperrazza *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 804 F. 3d 1113.

No. 15–981. Tuaua et al. *v.* United States et al. C. A. D. C. Cir. Certiorari denied. Reported below: 788 F. 3d 300.

No. 15–982. McCaffree et al. *v.* BancInsure, Inc., et al. C. A. 10th Cir. Certiorari denied. Reported below: 796 F. 3d 1226.

No. 15–1002. Aifang Ye *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 808 F. 3d 395.

No. 15–1064. Seminole Tribe of Florida *v.* Biegalski, Executive Director, Florida Department of Revenue. C. A. 11th Cir. Certiorari denied. Reported below: 799 F. 3d 1324.

No. 15–1133. Mark *v.* Tennessee. Ct. Crim. App. Tenn. Certiorari denied.

No. 15–1152. Michigan et al. *v.* Environmental Protection Agency et al. C. A. D. C. Cir. Certiorari denied.

No. 15–1245. Whelehan *v.* Bank of America Pension Plan for Legacy Companies—Fleet—Traditional Benefit et al. C. A. 2d Cir. Certiorari denied. Reported below: 621 Fed. Appx. 70.

No. 15–1252. Miller *v.* Metrocare Services, fka Dallas MHMR, et al. C. A. 5th Cir. Certiorari denied. Reported below: 809 F. 3d 827.

No. 15–1254. Duhamel *v.* Ohio. Ct. App. Ohio, 8th App. Dist., Cuyahoga County. Certiorari denied. Reported below: 2015-Ohio-3145.

No. 15–1258. Bent *v.* Bent. Ct. App. Wash. Certiorari denied. Reported below: 188 Wash. App. 1044.

No. 15–1264. Kinney *v.* California. Super. Ct. Cal., Contra Costa County. Certiorari denied.

No. 15–1265. Molina *v.* Aurora Loan Services, LLC, et al. C. A. 11th Cir. Certiorari denied. Reported below: 635 Fed. Appx. 618.

No. 15–1268. Bliss *v.* Deutsche Bank National Trust Co., as Trustee, et al. App. Ct. Conn. Certiorari denied. Reported below: 159 Conn. App. 483, 124 A. 3d 890.

No. 15–1272. California Artichoke & Vegetable Growers Corp., dba Ocean Mist Farms *v.* Agricultural Labor Relations Board. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 15–1275. Young *v.* Township of Irvington, New Jersey, et al. C. A. 3d Cir. Certiorari denied. Reported below: 629 Fed. Appx. 352.

No. 15–1280. Falco *v.* Justices of the Matrimonial Parts of the Supreme Court of Suffolk County. C. A. 2d Cir. Certiorari denied. Reported below: 805 F. 3d 425.

No. 15–1297. Cosgrove et al. *v.* City of Plano, Texas. C. A. 5th Cir. Certiorari denied. Reported below: 623 Fed. Appx. 708.

No. 15–1310. Mitrano *v.* JPMorgan Chase Bank, N. A., et al. C. A. 1st Cir. Certiorari denied.

No. 15–1316. Toneman et ux. *v.* U. S. Bank N. A. et al. C. A. 9th Cir. Certiorari denied. Reported below: 628 Fed. Appx. 523.

No. 15–1322. P & M Vanderpoel Dairy *v.* Agricultural Labor Relations Board. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 15–1327. Abel Family L. P. et al. *v.* United States et al. Sup. Ct. Mont. Certiorari denied. Reported below: 382 Mont. 46, 364 P. 3d 584.

No. 15–1333. Agola *v.* Grievance Committee for the Seventh Judicial District. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 128 App. Div. 3d 78, 6 N. Y. S. 3d 890.

No. 15–1338. Jianqing Wu *v.* Special Counsel et al. C. A. D. C. Cir. Certiorari denied.

No. 15–1369. Newegg Inc. *v.* MacroSolve, Inc. C. A. Fed. Cir. Certiorari denied. Reported below: 637 Fed. Appx. 591.

No. 15–7431. Liebeskind *v.* Rutgers University et al. Super. Ct. N. J., App. Div. Certiorari denied.

No. 15–7796. Ambrose *v.* Romanowski, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 801 F. 3d 567.

No. 15–7896. James *v.* California. Ct. App. Cal., 1st App. Dist., Div. 4. Certiorari denied. Reported below: 238 Cal. App. 4th 794, 189 Cal. Rptr. 3d 635.

No. 15–8026. MUHAMMAD *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 15–8063. WINKLES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 795 F. 3d 1134.

No. 15–8078. VILLALTA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 615 Fed. Appx. 157.

No. 15–8285. NORE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 631 Fed. Appx. 800.

No. 15–8524. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 15–8536. MADISON *v.* DAVIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 15–8851. ANDREWS ET AL. *v.* FLAIZ ET AL. C. A. 6th Cir. Certiorari denied.

No. 15–8859. BURGESS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2015 IL App (1st) 130657, 40 N. E. 3d 284.

No. 15–8862. MUHAMMAD *v.* GREEN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 633 Fed. Appx. 122.

No. 15–8865. CHRISTOPHER S. *v.* WINNEBAGO COUNTY, WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 2016 WI 1, 366 Wis. 2d 1, 878 N. W. 2d 109.

No. 15–8869. ROHRS *v.* ALDRIDGE, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 15–8872. WYATT *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 15–8883. COLLINS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2015 IL App (1st) 131145, 42 N. E. 3d 1.

No. 15–8888. KINGMA *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 188 Wash. App. 1030.

No. 15–8893. NOLL *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 125 A. 3d 446.

No. 15–8899. Wilburn *v.* Winn, Warden. C. A. 6th Cir. Certiorari denied.

No. 15–8900. White *v.* Lawson et al. C. A. 6th Cir. Certiorari denied.

No. 15–8903. Nelson *v.* South Dakota. Sup. Ct. S. D. Certiorari denied. Reported below: 877 N. W. 2d 105.

No. 15–8904. Wafer *v.* Sherman, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 627 Fed. Appx. 586.

No. 15–8905. Taylor *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 15–8908. Briseno *v.* California. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 15–8910. Bell *v.* Massachusetts. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 473 Mass. 131, 39 N. E. 3d 1190.

No. 15–8913. Ancalade *v.* Louisiana. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 2014–0739 (La. App. 4 Cir. 1/14/15), 158 So. 3d 891.

No. 15–8920. Jones *v.* MacLaren, Warden. C. A. 6th Cir. Certiorari denied.

No. 15–8922. Polly *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 15–8924. White *v.* Ryan et al. C. A. 9th Cir. Certiorari denied.

No. 15–8934. Young *v.* Tritt, Superintendent, State Correctional Institution at Frackville, et al. C. A. 3d Cir. Certiorari denied.

No. 15–8938. Leopold *v.* Georgia. Ct. App. Ga. Certiorari denied. Reported below: 333 Ga. App. 777, 777 S. E. 2d 254.

No. 15–8939. Eizember *v.* Duckworth, Acting Warden. C. A. 10th Cir. Certiorari denied. Reported below: 803 F. 3d 1129.

No. 15–8958. Frazier *v.* Michigan. Sup. Ct. Mich. Certiorari denied. Reported below: 498 Mich. 867, 866 N. W. 2d 443.

No. 15–8965. Danihel *v.* Office of the President of the United States et al. C. A. 3d Cir. Certiorari denied. Reported below: 640 Fed. Appx. 185.

No. 15–8967. Estela-Gomez *v.* Lynch, Attorney General. C. A. 3d Cir. Certiorari denied. Reported below: 629 Fed. Appx. 432.

No. 15–8976. Cottrell *v.* Barksdale, Warden. Sup. Ct. Va. Certiorari denied.

No. 15–9007. Kirby et al. *v.* Kirk, Judge, District Court of Oklahoma, Lincoln County, et al. Ct. Crim. App. Okla. Certiorari denied.

No. 15–9012. Moore *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 132 A. 3d 1176.

No. 15–9015. Skoloda *v.* Garman, Superintendent, State Correctional Institution at Rockview, et al. C. A. 3d Cir. Certiorari denied.

No. 15–9020. Levier *v.* Cain, Warden. C. A. 5th Cir. Certiorari denied.

No. 15–9050. Russell *v.* Ryan, Director, Arizona Department of Corrections, et al. C. A. 9th Cir. Certiorari denied.

No. 15–9054. Lamb *v.* Jones, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 15–9060. Lockhart *v.* Tennessee. Ct. Crim. App. Tenn. Certiorari denied.

No. 15–9089. Williams *v.* Oregon. Ct. App. Ore. Certiorari denied. Reported below: 272 Ore. App. 770, 358 P. 3d 299.

No. 15–9090. Thomas *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 615 Fed. Appx. 825.

No. 15–9111. Faircloth *v.* Colorado. Ct. App. Colo. Certiorari denied.

No. 15–9119. May *v.* Greene County Sheriff's Department et al. Ct. App. Ind. Certiorari denied.

No. 15–9150. Moore *v.* South Carolina. Sup. Ct. S. C. Certiorari denied. Reported below: 415 S. C. 245, 781 S. E. 2d 897.

No. 15–9152. Robinson *v.* Jones, Secretary, Florida Department of Corrections. Sup. Ct. Fla. Certiorari denied.

No. 15–9182. Nielsen *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 640 Fed. Appx. 224.

No. 15–9209. Espinoza, aka Medrano Espinoza *v.* Mississippi. Sup. Ct. Miss. Certiorari denied.

No. 15–9211. Reber *v.* Florida. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 181 So. 3d 501.

No. 15–9214. Hughes *v.* Walker, Warden. C. A. 9th Cir. Certiorari denied.

No. 15–9217. A. D. H. *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 131 A. 3d 100.

No. 15–9232. Caillier, aka Callier *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 15–9245. Murillo-Angulo *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 15–9246. Mescall *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 624 Fed. Appx. 103.

No. 15–9247. Eleby *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 133 A. 3d 1005.

No. 15–9250. Welch *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 811 F. 3d 275.

No. 15–9252. Terrell *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 15–9253. Wilson *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 15–9254. White *v.* Taylor, Warden. C. A. 11th Cir. Certiorari denied. Reported below: 636 Fed. Appx. 521.

No. 15–9258. Sanchez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 633 Fed. Appx. 271.

No. 15–9261. Curley *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 15–9265. Graham *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 630 Fed. Appx. 712.

No. 15–9268. Juarez-Gonzalez *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 15–9271. Morris *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 132 A. 3d 172.

No. 15–9280. Borjas-Ramos *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 633 Fed. Appx. 250.

No. 15–9282. Bowen *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 818 F. 3d 179.

No. 15–9287. Jackson *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 637 Fed. Appx. 223.

No. 15–9303. Gladney *v.* Pollard, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 799 F. 3d 889.

No. 15–9320. Manuel Carreon *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 632 Fed. Appx. 902.

No. 15–9321. Roberts *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 15–1347. D'Agostino et al. *v.* Baker, Governor of Massachusetts, et al. C. A. 1st Cir. Motion of Cato Institute for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 812 F. 3d 240.

No. 15–1356. Kapordelis *v.* Baird, Warden. C. A. 7th Cir. Certiorari denied. Justice Kagan took no part in the consideration or decision of this petition.

No. 15–7539. Walsh *v.* PNC Bank et al. Ct. App. Cal., 3d App. Dist. Certiorari denied. Justice Alito took no part in the consideration or decision of this petition.

No. 15–9010. Masarik *v.* United States. C. A. 7th Cir. Certiorari denied. Justice Kagan took no part in the consideration or decision of this petition. Reported below: 630 Fed. Appx. 630.

No. 15–9262. Taylor *v.* United States. C. A. 4th Cir. Certiorari denied. Justice Kagan took no part in the consideration or decision of this petition. Reported below: 632 Fed. Appx. 142.

Rehearing Denied

No. 15–924. Winward *v.* Utah, 577 U. S. 1235;

No. 15–1018. Youngblood *v.* Fort Bend Independent School District, 578 U. S. 922;

No. 15–1029. Mua *v.* Board of Education of Prince George's County, 578 U. S. 923;

No. 15–1062. Hemopet *v.* Hill's Pet Nutrition, Inc., 578 U. S. 923;

No. 15–1071. Bieri *v.* Greene County Planning and Zoning Department et al., 578 U. S. 923;

No. 15–7595. Nelson et al. *v.* Louise, Mayor of City of Port Allen, Louisiana, et al., 577 U. S. 1196;

No. 15–7911. Rickmyer *v.* Jungers et al., 578 U. S. 908;

No. 15–7950. In re Grenadier, 578 U. S. 904;

No. 15–8023. Guinn *v.* Colorado Attorney Regulation Counsel, 578 U. S. 927;

No. 15–8144. Schum *v.* Federal Communications Commission et al., 578 U. S. 930;

No. 15–8164. Kostich *v.* McCollum, Warden, 578 U. S. 931;

No. 15–8168. Djenasevic, aka Genase, aka Kraja *v.* United States, 578 U. S. 911;

No. 15–8220. Kammerer *v.* State Bar of California, 577 U. S. 1239;

No. 15–8308. Amir-Sharif *v.* Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division, et al., 578 U. S. 948;

No. 15–8324. McCray *v.* Graham, Superintendent, Auburn Correctional Facility, 578 U. S. 933;

No. 15–8397. Rankin *v.* Brian Lavan & Associates, P. C., et al., 578 U. S. 962;

No. 15–8422. Pennington-Thurman *v.* Bank of America et al., 578 U. S. 934;

No. 15–8425. Fleming *v.* United States, 578 U. S. 949;

No. 15–8604. Pastorek *v.* United States, 578 U. S. 939;
No. 15–8657. Redifer *v.* United States, 578 U. S. 940; and
No. 15–8672. In re Visintine, 578 U. S. 920. Petitions for rehearing denied.

June 16, 2016

Miscellaneous Order

No. 15A1207. J&K Administrative Management Services, Inc., et al. *v.* Robinson et al. Application to recall and stay the mandate of the United States Court of Appeals for the Fifth Circuit, presented to Justice Thomas, and by him referred to the Court, denied.

June 20, 2016

Certiorari Granted—Vacated and Remanded

No. 14–9409. Williams *v.* Louisiana. Ct. App. La., 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Foster* v. *Chatman*, 578 U. S. 488 (2016). Reported below: 2013–0283 (La. App. 4 Cir. 4/23/14), 137 So. 3d 832.

Justice Ginsburg, with whom Justice Breyer, Justice Sotomayor, and Justice Kagan join, concurring.

"The Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Foster* v. *Chatman*, 578 U. S. 488, 499 (2016) (citing *Batson* v. *Kentucky*, 476 U. S. 79 (1986); internal quotation marks omitted). *Batson* "provides a three-step process for determining when a strike is discriminatory:

> "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, *the prosecution* must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." *Foster*, 578 U. S., at 499 (internal quotation marks omitted; emphasis added).

This case concerns a Louisiana procedural rule that permits the trial court, rather than the prosecutor, to supply a race-neutral reason at *Batson*'s second step if "the court is satisfied that such reason is apparent from the voir dire examination of the juror." La. Code Crim. Proc. Ann., Art. 795(C) (West 2013). Louisiana's rule, as the Louisiana Supreme Court has itself recognized, does not comply with this Court's *Batson* jurisprudence. *State* v. *Elie*, 2005–1569 (La. 7/10/2006), 936 So. 2d 791, 797 (citing *Johnson* v. *California*, 545 U. S. 162, 172 (2005)). At *Batson*'s second step, "the trial court [must] demand an explanation from the prosecutor." *Johnson*, 545 U. S., at 170; see *id.*, at 172 ("The *Batson* framework is designed to produce actual answers [from a prosecutor] to suspicions and inferences that discrimination may have infected the jury selection process. . . . It does not matter that the prosecutor might have had good reasons; what matters is the real reason [jurors] were stricken." (internal quotation marks and alterations omitted)); *id.*, at 173 (improper to "rel[y] on judicial speculation to resolve plausible claims of discrimination").

The rule allowing judge-supplied reasons, nonetheless, remains operative in Louisiana and was applied in petitioner's 2012 trial. On remand, the appropriate state court should reconsider petitioner's argument that the rule cannot be reconciled with *Batson*. A Louisiana court, "like any other state or federal court, is bound by this Court's interpretation of federal law." *James* v. *Boise*, 577 U. S. 306, 307 (2016) (*per curiam*). See also 2013–0283, pp. 8–9 (La. App. 4 Cir. 4/23/14), 137 So. 3d 832, 859 (Belsome, J., dissenting) ("[T]he United States Supreme Court has made clear . . . that the State is obligated to offer a race-neutral reason. The judge is an arbiter not a participant in the judicial process. Allowing the court to provide race-neutral reasons for the State violates [the Constitution].").

JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting.

For the reasons set out in my statement in *Flowers* v. *Mississippi*, immediately *infra*, I would deny the petition.

The concurring statement calls upon the appropriate state court on remand to consider petitioner's argument that the trial judge did not comply with the second step of the procedure mandated by *Batson* v. *Kentucky*, 476 U. S. 79 (1986), because the judge, in accordance with a state procedural rule, rejected a defense challenge on the ground that a race-neutral reason for the strike was apparent from the *voir dire* of the juror in question. But whether petitioner is entitled to relief on this ground has nothing to do with *Foster*, which "address[ed] only *Batson*'s third step." *Foster* v. *Chatman*, 578 U. S. 488, 499 (2016).

No. 14–10486. Flowers *v.* Mississippi. Sup. Ct. Miss. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Foster* v. *Chatman*, 578 U. S. 488 (2016). Reported below: 158 So. 3d 1009.

Justice Alito, with whom Justice Thomas joins, dissenting.

This Court often "GVRs" a case—that is, grants the petition for a writ of certiorari, vacates the decision below, and remands for reconsideration by the lower court—when we believe that the lower court should give further thought to its decision in light of an opinion of this Court that (1) came after the decision under review and (2) changed or clarified the governing legal principles in a way that could possibly alter the decision of the lower court. In this case and two others, *Williams* v. *Louisiana*, immediately *supra*, and *Floyd* v. *Alabama*, *infra*, p. 916, the Court misuses the GVR vehicle. The Court GVRs these petitions in light of our decision in *Foster* v. *Chatman*, 578 U. S. 488 (2016), which held, based on all the circumstances in that case, that a state prosecutor violated *Batson* v. *Kentucky*, 476 U. S. 79 (1986), by striking potential jurors based on race. Our decision in *Foster* postdated the decision of the Supreme Court of Mississippi in the present case, but *Foster* did not change or clarify the *Batson* rule in any way. Accordingly, there is no ground for a GVR in light of *Foster*.

The ultimate issue in *Batson* is a pure question of fact—whether a party exercising a peremptory challenge engaged in intentional discrimination on the basis of race. 476 U. S., at 93–94. If the party contesting a particular peremptory challenge makes out a prima facie case (that is, points out a pattern of strikes that calls for further inquiry), the party exercising the challenge must provide a legitimate race-neutral reason for the strike. *Id.*, at 97. If that is done, the trial judge must then make a finding as to whether the party exercising the peremptory challenge is telling the truth. *Id.*, at 98. There is no mechanical formula for the trial judge to use in making that decision, and in some cases the finding may be based on very intangible factors, such as the demeanor of the prospective juror in question and that of the attorney who exercised the strike. *Snyder* v. *Louisiana*, 552 U. S. 472, 477 (2008). For this reason and others, the finding of the trial judge is entitled to a very healthy measure of deference. *Id.*, at 479.

Foster did not change the *Batson* analysis one iota. In *Foster*, the Court's determination that the prosecution struck jurors based on race—a determination with which I fully agreed, 578 U. S., at 515 (ALITO, J., concurring in judgment)—was based on numerous *case-specific factors*, including evidence that racial considerations permeated the jury selection process from start to finish and the prosecution's shifting and unreliable explanations for its strikes of black potential jurors in light of that evidence.

In particular, evidence of racial bias in *Foster* included the following facts revealed to be a part of the prosecution's jury selection file, which the Court held undermined the prosecution's defense of its strikes: copies of a jury venire list highlighting the names of black jurors; a draft affidavit from a prosecution investigator ranking black potential jurors; notes identifying black prospective jurors as "B#1," "B#2," and "B#3"; notes suggesting that the prosecution marked "N" (for "no") next to the names of all black prospective jurors; a "definite NO's" list that included the names of all black prospective jurors; a document relating to one juror with notes about the Church of Christ that stated "NO. No Black Church"; the questionnaires filled out by jurors, in which the race of black prospective jurors was circled. *Id.*, at 488, 493–495 (majority opinion) (internal quotation marks omitted). But this overwhelming evidence of race consciousness was not the end of the Court's analysis in *Foster*. The Court also discussed evidence that the prosecution's stated reasons for striking black jurors were inconsistent and malleable. The prosecution's various rationales for its strikes "ha[d] no grounding in fact," were "contradicted by the record," and simply "cannot be credited," according to the Court. *Id.*, at 302, 305–307. Some of the purported reasons for striking black prospective jurors "shifted over time" and could not withstand close scrutiny. *Id.*, at 508. And other reasons, "while not explicitly contradicted by the record, [we]re difficult to credit" in light of the way in which the State treated similarly situated white jurors. *Id.*, at 505–507. In sum, the Court's decision in *Foster* relied on substantial, case-specific evidence in reaching its conclusion that the prosecution's proffered explanations for striking black prospective jurors could not be credited.

In the three cases in which the Court now GVRs in light of *Foster*, what the Court is saying, in effect, is something like this. If we granted review in these cases, we would delve into the facts and carefully review the trial judge's findings on the question of the prosecution's intent. That is what we did in *Foster*. But we do not often engage in review of such case-specific factual questions, and we do not want to do that here. Therefore, we will grant, vacate, and remand so that the lower court can do—or, redo—that hard work.

This is not a responsible use of the GVR power. In this case, the Supreme Court of Mississippi decided the *Batson* issue. It found insufficient grounds to overturn the trial judge's finding that the contested strikes were not based on race. If the majority wishes to review that decision, it should grant the petition for a writ of certiorari, issue a briefing schedule, and hear argument. If the majority is not willing to spend the time that full review would require, it should deny the petition.

The Court's decision today is not really a GVR in light of our factbound decision in *Foster*. It is, rather, a GVR in light of our 1986 decision in *Batson*. But saying that would be ridiculous, because the lower courts fully considered the *Batson* issue this petition raises. By granting, vacating, and remanding, the Court treats the State Supreme Court like an imperious senior partner in a law firm might treat an associate. Without pointing out any errors in the State Supreme Court's analysis, the majority simply orders the State Supreme Court to redo its work. We do not have that authority.

I would deny the petition. I respectfully dissent.

No. 15–635. Innovention Toys, LLC *v.* MGA Entertainment, Inc., et al. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Halo Electronics, Inc.* v. *Pulse Electronics, Inc.*, *ante*, p. 93. Reported below: 611 Fed. Appx. 693.

No. 15–1085. WesternGeco LLC *v.* ION Geophysical Corp. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Halo Electronics, Inc.* v. *Pulse Electronics, Inc.*, *ante*, p. 93. Justice Alito took no part in the consideration or decision of this petition. Reported below: 791 F. 3d 1340.

No. 15–7553. Floyd *v.* Alabama. Sup. Ct. Ala. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Foster* v. *Chatman*, 578 U. S. 488 (2016). Reported below: 191 So. 3d 147.

Justice Alito, with whom Justice Thomas joins, dissenting.

I would deny the petition for the reasons set out in my statement in *Flowers* v. *Mississippi*, *supra*, p. 913 (opinion dissenting from decision to grant, vacate, and remand).

Certiorari Dismissed

No. 15–9200. Loi Ngoc Nghiem *v.* Kerestes, Superintendent, State Correctional Institution at Mahanoy, et al. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 15M131. Welcome *v.* Mabus, Secretary of the Navy. Motion for leave to proceed as a veteran denied.

No. 15M132. Jackson *v.* Colvin, Acting Commissioner of Social Security; and

No. 15M133. L'Ggrke *v.* Asset Plus Corp. et al. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 15–1039. Sandoz Inc. *v.* Amgen Inc. et al.; and

No. 15–1195. Amgen Inc. et al. *v.* Sandoz Inc. C. A. Fed. Cir. The Solicitor General is invited to file a brief in these cases expressing the view of the United States.

No. 15–1189. Impression Products, Inc. *v.* Lexmark International, Inc. C. A. Fed. Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 15–9476. In re Bodnar. Petition for writ of habeas corpus denied.

No. 15–9166. In re Mason; and

No. 15–9330. In re Hook. Petitions for writs of mandamus denied.

Certiorari Granted

No. 15–1204. Jennings et al. *v.* Rodriguez et al., Individually and on Behalf of All Others Similarly Situated. C. A. 9th Cir. Certiorari granted. Reported below: 804 F. 3d 1060.

No. 15–1251. National Labor Relations Board *v.* SW General, Inc., dba Southwest Ambulance. C. A. D. C. Cir. Certiorari granted. Reported below: 796 F. 3d 67.

Certiorari Denied

No. 15–942. Black & Decker (U. S.) Inc. et al. *v.* SD3, LLC, et al. C. A. 4th Cir. Certiorari denied. Reported below: 801 F. 3d 412.

No. 15–947. Price et al., Individually and on Behalf of All Others Similarly Situated *v.* Philip Morris, Inc. Sup. Ct. Ill. Certiorari denied. Reported below: 2015 IL 117687, 43 N. E. 3d 53.

No. 15–1028. Fazio *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 795 F. 3d 421.

No. 15–1030. Shew et al. *v.* Malloy, Governor of Connecticut, et al. C. A. 2d Cir. Certiorari denied. Reported below: 804 F. 3d 242.

No. 15–1033. DeJoria *v.* Maghreb Petroleum Exploration, S. A., et al. C. A. 5th Cir. Certiorari denied. Reported below: 804 F. 3d 373.

No. 15–1117. Turturro, Administrator of the Estate of Braddock, Deceased, et al. *v.* Federal Aviation Administration et al. C. A. 3d Cir. Certiorari denied. Reported below: 629 Fed. Appx. 313.

No. 15–1138. Bernardo, on Behalf of M&K Engineering, Inc. *v.* Johnson, Secretary of Homeland Security, et al. C. A. 1st Cir. Certiorari denied. Reported below: 814 F. 3d 481.

No. 15–1140. Binday *v.* United States;

No. 15–1177. Kergil *v.* United States; and
No. 15–8582. Resnick *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 804 F. 3d 558.

No. 15–1150. Hunter *v.* Colvin, Acting Commissioner of Social Security. C. A. 11th Cir. Certiorari denied. Reported below: 808 F. 3d 818.

No. 15–1157. Distributed Solutions, Inc. *v.* James, Secretary of the Air Force. C. A. Fed. Cir. Certiorari denied. Reported below: 617 Fed. Appx. 996.

No. 15–1203. Globus Medical, Inc. *v.* Bianco. C. A. Fed. Cir. Certiorari denied. Reported below: 618 Fed. Appx. 1032.

No. 15–1270. M. C. *v.* T. W. et al. Sup. Ct. Colo. Certiorari denied. Reported below: 363 P. 3d 193.

No. 15–1278. Gage County, Nebraska, et al. *v.* Dean et al. C. A. 8th Cir. Certiorari denied. Reported below: 807 F. 3d 931.

No. 15–1279. Fernandez *v.* LaSalle Bank N. A. et al. Sup. Ct. Fla. Certiorari denied.

No. 15–1284. Hutchinson *v.* Whaley et al. Ct. App. Ga. Certiorari denied. Reported below: 333 Ga. App. 773, 777 S. E. 2d 251.

No. 15–1288. Lano et al. *v.* Carnival Corp. et al. C. A. 9th Cir. Certiorari denied. Reported below: 621 Fed. Appx. 373.

No. 15–1296. Cherryholmes *v.* Ohio. Ct. App. Ohio, 5th App. Dist., Fairfield County. Certiorari denied. Reported below: 2015-Ohio-3063.

No. 15–1298. Holanek *v.* North Carolina. Ct. App. N. C. Certiorari denied. Reported below: 242 N. C. App. 633, 776 S. E. 2d 225.

No. 15–1300. Intertransfers, Inc. *v.* Luxor Agentes Autonomos de Investimientos, Ltda. C. A. 11th Cir. Certiorari denied. Reported below: 638 Fed. Appx. 925.

No. 15–1302. Aaron *v.* CBS Outdoors, Inc. Ct. App. Mich. Certiorari denied.

No. 15–1307. Lora *v.* Shanahan et al. C. A. 2d Cir. Certiorari denied. Reported below: 804 F. 3d 601.

No. 15–1354. Webb *v.* Texas. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 15–1382. Kanofsky *v.* Commissioner of Internal Revenue. C. A. 4th Cir. Certiorari denied. Reported below: 622 Fed. Appx. 301.

No. 15–1390. Curry *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 15–1396. Rivas *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 637 Fed. Appx. 338.

No. 15–1403. Kim *v.* Yeong Kuk Ahn. Ct. App. Cal., 2d App. Dist., Div. 1. Certiorari denied.

No. 15–7005. Aziz *v.* New Jersey. Super. Ct. N. J., App. Div. Certiorari denied.

No. 15–7384. Cazares et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 788 F. 3d 956.

No. 15–7475. Gibson *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 615 Fed. Appx. 619.

No. 15–7834. Lyle *v.* Aiken et al. C. A. 6th Cir. Certiorari denied.

No. 15–7850. Chavarria Delgado *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 620 Fed. Appx. 329.

No. 15–7855. Fisk *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 619 Fed. Appx. 417.

No. 15–8050. Bell *v.* Arkansas. Sup. Ct. Ark. Certiorari denied. Reported below: 2015 Ark. 370.

No. 15–8307. Morgan *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 121 A. 3d 1235.

No. 15–8563. Hernandez *v.* Florida et al. Sup. Ct. Fla. Certiorari denied. Reported below: 180 So. 3d 978.

No. 15–8601. Moore *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 624 Fed. Appx. 244.

No. 15–8603. Villegas-Rodriguez *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 617 Fed. Appx. 597.

No. 15–8635. Yeomans *v.* Alabama. Ct. Crim. App. Ala. Certiorari denied.

No. 15–8704. Kampfer *v.* Cuomo, Governor of New York. C. A. 2d Cir. Certiorari denied. Reported below: 643 Fed. Appx. 43.

No. 15–8779. Brown *v.* Louisiana. Sup. Ct. La. Certiorari denied. Reported below: 2015–2001 (La. 2/19/16), 184 So. 3d 1265.

No. 15–8929. Bell *v.* U. S. Bank N. A. et al. Sup. Ct. Fla. Certiorari denied.

No. 15–8930. Ambrose *v.* Trierweiler, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 621 Fed. Appx. 808.

No. 15–8931. Morrow *v.* Pash, Warden. C. A. 8th Cir. Certiorari denied.

No. 15–8932. Lampkin *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 15–8936. Tetreau *v.* Campbell, Warden. C. A. 6th Cir. Certiorari denied.

No. 15–8940. Karnazes *v.* United States District Court for the Central District of California et al. C. A. 9th Cir. Certiorari denied.

No. 15–8944. McCain *v.* Illinois. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2015 IL App (2d) 140280–U.

No. 15–8945. Proctor *v.* Burke et al. C. A. 3d Cir. Certiorari denied. Reported below: 630 Fed. Appx. 127.

No. 15–8954. Buycks *v.* LBS Financial Credit Union et al. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 15–8956. Sabby *v.* Hammer, Warden. C. A. 8th Cir. Certiorari denied.

No. 15–8957. Hupp *v.* Petersen et al. C. A. 9th Cir. Certiorari denied.

No. 15–8959. Gabb *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2014 IL App (1st) 120908–U.

No. 15–8964. Turner *v.* Wright et al. Sup. Ct. Miss. Certiorari denied.

No. 15–8966. Carter *v.* Acholonu et al. C. A. 11th Cir. Certiorari denied.

No. 15–8971. Johnson *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 62 Cal. 4th 600, 364 P. 3d 359.

No. 15–8972. Morgan *v.* Hatton, Warden. C. A. 9th Cir. Certiorari denied.

No. 15–8992. Klein *v.* Pringle, Warden. C. A. 8th Cir. Certiorari denied.

No. 15–8993. LeBoon *v.* Alan McIlvain Co. C. A. 3d Cir. Certiorari denied. Reported below: 628 Fed. Appx. 98.

No. 15–8994. Whipple *v.* Jones, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied.

No. 15–9062. Mays *v.* Whitener, Superintendent, Marion Correctional Institution, et al. C. A. 4th Cir. Certiorari denied. Reported below: 633 Fed. Appx. 161.

No. 15–9125. Zarazu *v.* Spearman, Warden. C. A. 9th Cir. Certiorari denied.

No. 15–9167. Suratos *v.* Foster, Warden. C. A. 9th Cir. Certiorari denied.

No. 15–9201. Gunderson *v.* Kirkegard, Warden, et al. C. A. 9th Cir. Certiorari denied.

No. 15–9219. Manning *v.* Rock, Superintendent, Upstate Correctional Facility. C. A. 2d Cir. Certiorari denied. Reported below: 633 Fed. Appx. 26.

No. 15–9237. Luster *v.* Laxalt, Attorney General of Nevada, et al. C. A. 9th Cir. Certiorari denied.

No. 15–9240. Tanguay *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 809 F. 3d 677.

No. 15–9281. Bowman *v.* Florida. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 184 So. 3d 535.

No. 15–9290. McCary *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 614 Fed. Appx. 383.

No. 15–9294. Badini *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 15–9296. Colton *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 15–9302. Faulds *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 617 Fed. Appx. 581.

No. 15–9305. Mango *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 633 Fed. Appx. 257.

No. 15–9308. Carmona-Ramos *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 638 Fed. Appx. 351.

No. 15–9331. Dupree *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 620 Fed. Appx. 49.

No. 15–9333. Richmond *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 641 Fed. Appx. 295.

No. 15–9338. Lowe *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 643 Fed. Appx. 834.

No. 15–9341. Martinez Meza *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 642 Fed. Appx. 332.

No. 15–9347. Buchanan *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 637 Fed. Appx. 327.

No. 15–9357. Flores-Rodriguez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 634 Fed. Appx. 471.

No. 15–9358. Smith *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 637 Fed. Appx. 572.

No. 15–9360. Fullman *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 122 A. 3d 455.

No. 15–9380. Maunteca-Lopez *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 15–9384. Thompson *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 15–9387. Vasiloff *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 622 Fed. Appx. 881.

No. 15–9391. Antonio Carmona *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 15–9403. Suarez-Guzman *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 15–9406. High *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 593 Fed. Appx. 234.

No. 15–9407. Haskins *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 15–9408. Miller *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 819 F. 3d 1314.

No. 15–9416. Perez Ramirez *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 15–9418. Bartolo-Guerra *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 637 Fed. Appx. 138.

No. 15–1020. Ntsebeza et al. *v.* Ford Motor Co. et al. C. A. 2d Cir. Certiorari denied. Justice Sotomayor took no part in the consideration or decision of this petition. Reported below: 796 F. 3d 160.

No. 15–1049. M. A., as Mother of J. D. *v.* Padilla, Judge, Superior Court of Arizona, Maricopa County, et al. Ct. App. Ariz. Motion of respondent Christopher Allen Simcox for leave to proceed *in forma pauperis* granted. Motions of Defenders of Children; Child Justice, Inc., et al.; and Arizona Voice for Crime Victims et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 237 Ariz. 263, 349 P. 3d 1100.

No. 15–9402. Lewis *v.* United States. C. A. 2d Cir. Certiorari denied. Justice Sotomayor took no part in the consideration or decision of this petition.

Rehearing Denied

No. 15–878. Chinweze *v.* Bank of America, N. A., 577 U. S. 1194;

No. 15–1065. Chaparro et ux. *v.* U. S. Bank N. A., 578 U. S. 923;

No. 15–6345. Rogers *v.* Perry, Secretary, North Carolina Department of Public Safety, 577 U. S. 1015;

No. 15–7872. Lewis *v.* Texas, 578 U. S. 907;

No. 15–7893. Matthisen *v.* United States, 578 U. S. 908;

No. 15–7993. Willyard *v.* Kelley, Director, Arkansas Department of Correction, 578 U. S. 926;

No. 15–8040. Constant *v.* DTE Electric Co., aka Detroit Edison Co., 578 U. S. 927;

No. 15–8098. Walker *v.* City of Memphis, Tennessee, et al., 578 U. S. 929;

No. 15–8224. Small *v.* Florida, 578 U. S. 932;

No. 15–8314. Alberto Solernorona *v.* Michigan, 578 U. S. 948;

No. 15–8379. Inta *v.* United States District Court for the Eastern District of Missouri, 578 U. S. 961;

No. 15–8398. Jehovah *v.* Clarke, Director, Virginia Department of Corrections, et al. (two judgments), 578 U. S. 962;

No. 15–8437. Shellman *v.* Colvin, Acting Commissioner, Social Security Administration, 578 U. S. 950; and

No. 15–8500. Davis *v.* Roundtree et al., 578 U. S. 950. Petitions for rehearing denied.